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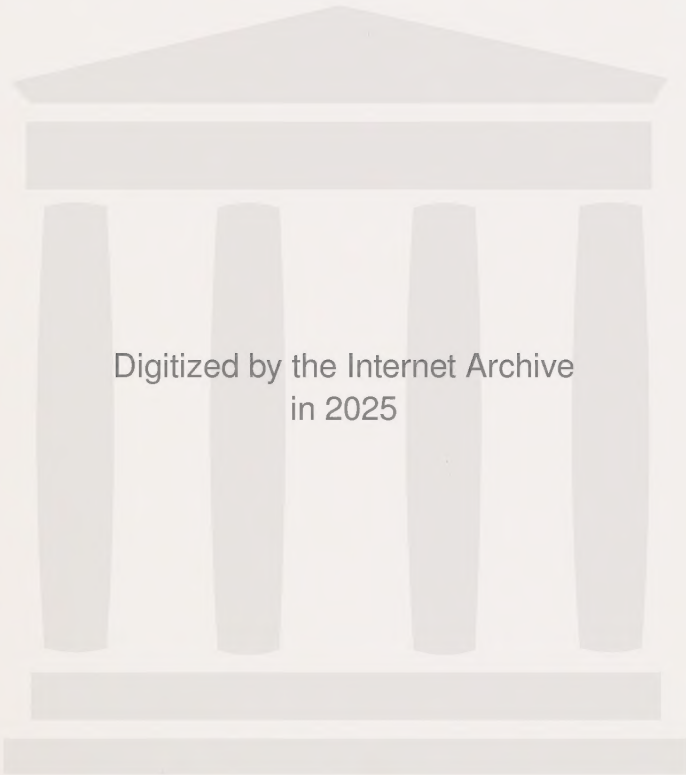
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A

PRACTICAL AND ELEMENTARY

Abridgment of the Common Law

AS ALTERED AND ESTABLISHED

BY THE

RECENT STATUTES, RULES OF COURT,

AND

MODERN DECISIONS;

COMPRISING A

FULL ABSTRACT OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Law, & on Appeal.

WITH

THE RULES OF COURT, FROM M. T. 1824, TO M. T. 1840, INCLUSIVE,

AND

THE STATUTES DURING THE SAME PERIOD.

WITH

CONNECTING AND ILLUSTRATIVE REFERENCES TO THE EARLIER AUTHORITIES AND EXPLANATORY NOTES.

BY CHARLES PETERSDORFF, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. V.

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A

PRACTICAL ABRIDGMENT

OF THE

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Queen's Bench, Common Pleas, & Exchequer,

FROM

MICH. TERM, 4 GEO. 4, TO MICH. TERM, 3 VICT.,

AND OF

THE RULES OF COURT, STATUTES, &c. &c. &c.

New Assignment.

See tits. *Assault and Battery—Payment—Replevin—Trespass—Way*—and tits. according to the subject-matter of the plea.

HALL *v.* MIDDLETON, M. T. 1835. K. B. 5 *N. & M.* 410.

In actions ex contractu, under a new assignment in assumpsit, the question is, whether there were two debts.

IN assumpsit, and plea, payment of £—— in satisfaction; replication, new assigning a different debt, and plea to the new assignment, non assumpsit—

The Court held, that the only question for the jury was, whether there were two debts; and that, upon proof by the plaintiff of one debt, and by the defendant of a payment of that amount, without distinctly identifying the debt proved with the payment made, the jury ought to have been directed to say whether there were two debts; and a new trial granted.

Newspaper*. See tit. *Libel.*

* The proprietor of a newspaper cannot recover for the non-performance of a contract for printing such newspaper, before filing the affidavit required by the 38 Geo. 3, c. 78. (*Houstoun* v. *Mills*, H. T. 1835, N. P., 1 M. & Rob. 325).

New Trial.

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I. RELATIVE TO DEFENDANT'S ELECTION BETWEEN MOTION FOR, AND APPLICATION IN ARREST OF, JUDGMENT.

PHILPOT *v.* PAGE, E. T. 1825. K. B. 4 *B. & C.* 160.

A defendant must elect between motion in arrest of judgment, or for a new trial.

A MOTION in arrest of judgment having been refused, application was made for a new trial.

Per Cur.—We are of opinion that the application for a new trial, being after a motion in arrest of judgment, was too late; and it is important to keep the various steps in causes distinct. When a motion is made in arrest of judgment, it is admitted that there is a verdict to which no objection can be made. The usual and proper course is where a rule for a new trial is granted to apply at the same time for leave to move in arrest of judgment, if there be any objection apparent on the record.

II. RELATIVE TO THE GROUNDS FOR.

(*a*) IN GENERAL *.

(*b*) CONCERNING RIGHT TO BEGIN.

BIRD *v.* HIGGINSON, M. T. 1834. K. B. 2 *Ad. & E.* 160.

An erroneous decision as to the right to begin, no ground for a new trial;

ON motion for a new trial, the Court refused the new trial on the ground that the judge had erroneously decided on the trial as to the right to begin.

* Where two issues were raised by the pleadings, and the jury found upon both, but the judge before whom the cause was tried discharged the jury upon the second issue, under misapprehension that the verdict upon one issue rendered the other issue immaterial. The Court held, that the proper course was not to move for a new trial, but to apply to a judge to have the verdict corrected according to his notes. (*Iles* v. *Turner*, M. T. 1834, Ex., 3 D. P. C. 211). The circumstance of the sheriff upon a writ of trial, or a judge of the superior courts, having refused to certify for stay of proceedings, under 3 & 4 Will. 4, c. 42, s. 8, does not preclude a party from applying for a new trial within the time limited. On such application the Court will judicially notice the record. (*Angell* v. *Iler*, M. T. 1839, Ex., 7 D. P. C. 846).

HUCKMAN *v.* FERNIE, M. T. 1837. Ex. 3 *M. & W.* 505.

but the doctrine is questionable.

ON motion for a new trial upon a question, whether the plaintiff or defendant had a right to begin, the Judge at Nisi Prius having decided clearly and manifestly wrong—

The Court granted a new trial.

(*c*) CONCERNING DAMAGES.

1. *Too large.*

WOOD *v.* HURD, H. T. 1835. C. P. 2 *Bing, N. S.* 166.

Excessive damages no ground in an action for breach of promise of marriage*,

THE Court refused a new trial, on the ground of excessive damages in an action for breach of promise of marriage, it appearing that the defendant, though not in possession, was entitled to considerable property in reversion.

EDGELL *v.* FRANCIS, T. T. 1840. C. P. 1 *Scott*, 118; S. C. 1 *M. & G.* 222.

or false imprisonment †.

IN an action for false imprisonment, where a verdict, with 200*l.* damages, was given for one night's confinement in a prison, evidence of a trespass by the defendant on the goods of the plaintiff, arising out of the same transaction, committed on the following day, was admitted, for the purpose of shewing that the defendant was actuated by malice.

The Court held, there was no ground for granting a new trial.

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2. *Too Small.*

MANNING *v.* UNDERWOOD, E. T. 1825. Ex. 1 *M. & Y.* 266.

No new trial where damages under 20*l.*, unless jury's conduct outrageous‡;

IN an action for goods sold, the jury found a verdict for 15*l.* On a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the verdict had been contrary to evidence—

Garrow, B.—I have always understood, that unless the conduct

* So, where the jury did not appear to have been actuated by undue motives, nor the result of gross error or misconception, the Court refused a new trial, in an action of crim. con., on the ground of the damages being large. (*Gough* v. *Farr*, T. T. 1827, Ex., 1 Y. & J. 477).

† Upon an application to set aside a verdict on the ground of excessive damages, the Court will not receive the affidavits of the defendant's witnesses, either to explain or to add to evidence given by them at the trial. (*Phillips* v. *Hatfield*, M. T. 1840, Ex., 8 D. P. C. 882).

‡ The practice of not granting a new trial, on the ground that the verdict was against evidence, if the amount claimed fall short of 20*l.*, applies to motions made by plaintiff, as well as motions made by defendant. But, where the ground is misdirection, the amount is not regarded; and where the judge had misdirected the jury, by submitting for their consideration a fact not proved, nor deducible from the evidence, the Court granted a new trial, though the amount in question was less than 1*l.* (*Haine* v. *Davey*, T. T. 1836, K. B., 4 A. & E. 892). Where a verdict is for a sum less than 20*l.*, unless practice or fraud on the part of the plaintiff is shewn, the Court will not disturb the verdict on the ground of surprise. (*Bransdon* v. *Didsbury*, M. T. 1840, B. C., 9 D. P. C. 199). The rule in the superior courts as to not granting new trials where the verdict is under 20*l.*, though against evidence, extends equally to cases tried at the great sessions in Wales.

of the jury has been quite outrageous, the Courts would not interfere, if the sum recovered was under 20*l.* It having been doubted whether that rule obtained in this Court, the point was considered here in a particular case; and it was decided that it did. It would be very inconvenient if there were a different rule in different Courts, on so important a subject.

——— *v.* PHILLIPS, M. T. 1833. Ex. 1 *C. & M.* 26; S. C. 3 *Tyrw.* 181.

ON motion for a new trial— or, without costs,

The Court held, the rule is not to grant a new trial where the verdict is under 20*l.*, unless where it can be granted without costs; where it was applied for as against evidence the Court refused the application.

RENDALL *v.* HAYWARD, H. T. 1839. C. P. 5 *Bing. N. S.* 424; S. C. 7 *Scott*, 407.

THE jury found only 20*s.* damages in a case of slander, although very gross— as, where damages only 20*s.*, in slander,

The Court refused a new trial, on the ground of the smallness of the damages.

BROWN *v.* KAY, M. T. 1824. C. P. 9 *Moore*, 583.

ON motion for a new trial in replevin, damages under 20*l.*, the ground was merely that the verdict was against the weight of evidence. or in replevin, under 20*l.**;

The Court refused to interfere.

YOUNG *v.* HARRIS, M. T. 1831. Ex. 2 *C. & J.* 14; S. C. 2 *Tyrw.* 167.

THE claim of the plaintiff was under 20*l.*, and the defendant obtained a verdict. and new facts no ground;

The Court refused to vary the rule as to not granting a new trial, on the ground of fresh matter having since come to the plaintiff's knowledge.

SCOTT *v.* WATKINSON, T. T. 1830. C. P. 4 *M. & P.* 237.

THE verdict (under 20*l.*) was against the opinion of the Judge and weight of evidence— but it will be granted if against the opinion of the Judge, on payment of costs.

The Court, nevertheless, refused a new trial, without payment of costs.

(*Bevan* v. *Jones*, E. T. 1828, Ex., 2 Y. & J. 264). But, if the Court considers the verdict perverse, a new trial will be granted, although the verdict under 20*l.*). *Freeman* v. *Price*, E. T. 1827, Ex., 1 Y. & J. 402). In trespass for shooting a dog, the only witness called to prove the value stated it to be 2*l.* 10*s.*, and that was not contradicted; yet the jury found a verdict for 20*s.* The Court refused to interfere, either by increasing the damages, or by granting a new trial. (*Cann* v. *Facey*, M. T. 1835, K. B., 3 N. & M. 405).

* So, the Court refused to grant a rule nisi for a new trial in an action of trespass, on the ground that the verdict was against evidence, where the damages fell below 20*l.*, though the case was stated to be of general importance, as relating to the boundaries of a jurisdiction. (*Powell* v. *Champion*, T. T. 1837, K. B., 6 Ad. & E. 407; S. C. 2 N. & P. 627).

3. *Mistake as to**.

(*d*) Concerning entry of cause in wrong list†.

(*e*) Concerning evidence and witnesses.

Doe *d.* Lord Teynham *v.* Tyler, T. T. 1830. C. P. 6 *Bing.* 561; S. C. 4 *M. & P.* 377.—S. P. Miller *v.* Tayler, E. T. 1837. C. P. 3 *Scott*, 513.

Where the preponderance of admissible evidence is in favour of the verdict, no ground‡;

On motion for a new trial—

Per Cur.—When the Court sees that there is evidence not merely enough to warrant the finding of the jury, independently of that which is objected to as having been improperly received, but that it greatly preponderates in favour of the verdict, the Court will not send the case to a new trial.

But see Crease v. *Barrett*, 1 *C., M. & R.* 919; *vide infra*, p. 7.

Doe *d.* James *v.* Price, H. T. 1828. K. B. 1 *M. & Ry.* 683.

nor where a party is aware a fact is to be proved, and does not come prepared to disprove it,

In ejectment, the plaintiff relied on the invalidity of a second marriage, by reason of a former marriage by license, one of the parties being a minor; and defendant had notice that the question intended to be raised was, whether the first marriage was with consent of the minor's parent, which rested upon defendant to disprove consent.

The Court refused a new trial to let in evidence negativing such consent, which it was the plaintiff's duty to have been prepared with in the first instance.

Swayne *v.* Ingilby, M. T. 1829. K. B. 5 *M. & Ry.* 125.

or an omission to give formal proof connected with a written document;

Action on a bill of exchange. The plaintiff having failed in proving a presentment at the office of the drawees, at Pinner's Hall, was nonsuited. On motion for a new trial, upon an affidavit stating that, before the bill became due, the drawees had broken up their original establishment at Pinner's Hall, and had removed their business to the office of one Gregson, and that an application for payment had been made at Gregson's when the bill became due. A rule nisi was granted upon payment of costs—

Sed per Cur.—The plaintiff must bring a fresh action. We cannot interfere.

* A small error in the amount of damages taken, not mentioned to the Judge at the trial, is not a ground for a new trial; (*Brown* v. *Tanner*, 1825, N. P., 1 C. & P. 655); but where, upon shewing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the Court will make the rule absolute, unless the parties consent that the damages shall be reduced. (*Leeson* v. *Smith*, M. T. 1834, K. B., 4 N. & M. 304). The Court in no case can increase the damages, though, on payment of costs, they might grant a new trial. (*Baker* v. *Brown*, 5 D. P. C. 313; S. C. 2 M. & W. 199).

† Where the cause had, by the marshal's mistake, been entered in the wrong list of causes, for the East and West Riding of York, and tried as undefended, the defendant's attorney having only searched one list:—Held, that he was not bound to search both, and a new trial granted. (*Hunter* v. *Hornblower*, H. T. 1835, Ex., 3 D. P. C. 491).

‡ Where no objection was made to the admissibility of evidence until the Judge commenced summing up, the Court afterwards refused to grant a new trial on that ground. (*Abbott* v. *Parsons*, T. T. 1831, C. P., 7 Bing. 563; S. C. 5 M. & P. 521).

ATKINS *v.* OWEN, M. T. 1834. K. B. 4 *N. & M.* 123.

unless it be out of the jurisdiction of the Court, and had been sent for.

A PLAINTIFF had been nonsuited on the ground of a non-production of a bill of exchange.

The Court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the Court, had been sent for in due time, but not received until too late for the trial, and that it was then in the plaintiff's possession.

FOSS *v.* WAGNER, M. T. 1836. K. B. 6 *Ad. & E.* 116.

So, the accidental admission of an unstamped document in evidence is no ground;

A WRITTEN paper being offered in evidence by plaintiff on a trial, the defendant's counsel desired to see it; before it was handed to him it was laid before the Judge, and afterwards, while the counsel's attention was accidentally diverted, and before the paper was handed to him, it was read in evidence. The Judge at Nisi Prius ruled that the counsel could not afterwards object to the want of a stamp; and the plaintiff having obtained a verdict—

The Court refused to grant a rule nisi for a new trial.

DOE *d.* GILBERT *v.* ROSS, T. T. 1840. Ex. 7 *M. & W.* 102.—S. P. DOE *d.* GORD *v.* NEED, T. T. 1837. Ex. 2 *M. & W.* 129.

nor admission of evidence submitted to on former trial*.

AT the trial all objections to the admissibility of evidence were reserved for the Court, which was to be taken as by mutual consent; but the legal evidence submitted for the opinion of the Court shewed a legal title in the plaintiffs.

The Court would only grant a new trial as to other facts not duly established but upon payment of costs.

CREASE *v.* BARRETT, H. T. 1835. Ex. 1 *C., M. & R.* 919, *questioning the rule laid down in* DOE *d.* LORD TEYNHAM *v.* TYLER, T. T. 1830. C. P. 6 *Bing.* 561, *and* TYRWHITT *v.* WYNNE, E. T. 1832. K. B. 4 *B. & Ad.* 559.

So, rejection of evidence is a ground†.

ON motion for a new trial, it appeared that evidence had been improperly rejected.

The Court said, they will grant a new trial upon rejected evidence, where a verdict given for the party offering it would be clearly against the weight of evidence.

* Where evidence is rejected which is tendered for one purpose, and it is inadmissible for that purpose, but is admissible in another view of the case, not alluded to at the trial, the Court will not grant a new trial as upon an improper rejection of evidence. (*Rex* v. *Grant*, H. T. 1834, K. B., 3 N. & M. 106; S. C. 5 B. & Ad. 1081).

† Where evidence tendered at the trial of a cause is formally objected to, and read, and the party by whom the evidence is tendered obtain a verdict, the Court will, upon the application of the opposite party, grant a new trial, if the evidence appears to have been inadmissible, without entering into any inquiry as to the materiality of such evidence; (*Doe* d. *Tatham* v. *Wright*, H. T. 1836, K. B., 6 N. & M. 132; S. C. 7 Ad. & E. 313); but where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel, at the trial, to admit certain documents in evidence which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant; but they refused to make the defendant's attorney pay the costs, because he was not present at the trial, when the objection was taken, and had given no instructions to the counsel to do so. (*Doe* d. *Tindal* v. *Roe*, H. T. 1836, K. B.,

SHILLITO *v.* THEED, M. T. 1830. C. P. 6 *Bing.* 753; S. C. *M. & P.* 575.—S. P. EDWARDS *v.* DIGNAM, E. T. 1834. Ex. 2 *D. P. C.* 642.

Accidental absence of a witness is a ground*.

AFTER a nonsuit, on account of the accidental absence of a witness subpœnaed—

The Court set it aside, and granted a new trial on payment of costs.

HEMMING *v.* ENGLISH, M. T. 1834. Ex. 1 *C., M. & R.* 568; S. C. 3 *D. P. C.* 155; S. C. 6 *C. & P.* 542.

But receiving an unreleased witness,

AN incompetent witness was allowed to give evidence on the faith of a release which the attorney undertook to give, but afterwards refused to give—

The Court held, that it was no ground for a new trial, the only remedy was upon such undertaking.

KELLEN *v.* BENNETT, T. T. 1827. C. P. 4 *Bing.* 171; S. C. 12 *Moore*, 393.

or witness requiring a release, no ground†.

A WITNESS, called on the part of the defendant, required a release, and, the effect of which the defendant misapprehending, was refused—

The Court held this not a sufficient ground for a new trial, though he was now ready to execute it.

(*f*) CONCERNING THE JUDGE, ERRONEOUS OPINION OR MISDIRECTION OF.

ALEXANDER *v.* BARKER, M. T. 1831. Ex. 2 *C. & J.* 133; S. C. 2 *Tyrw.* 140.—S. P. LORD *v.* WARDLE, T. T. 1836. C. P. 3 *Bing. N. S.* 680; S. C. 2 *Scott*, 402.

An erroneous opinion of the Judge is a

ON motion for a new trial, it appeared that, upon the expression of an opinion by the Judge, counsel acquiesced in a nonsuit. But such opinion was erroneous—

5 D. P. C. 420). So, in an action for use and occupation, a judgment in ejectment was produced on behalf of the lessor of the plaintiff, as part of the evidence of her title. Supposing this judgment to have been as represented, the defendant's counsel consented that this case (which consisted almost wholly of documentary evidence) should be presented for the opinion of the Court. It being afterwards shewn that the effect of the judgment had been misrepresented, the Court sent the cause down to a new trial, declining (the defendant not consenting) to decide upon the other facts of the case. (*Long* v. *Bilke*, E. T. 1840; S. C. Scott, N. S. 176; S. C. 1 M. & G. 87).

* But where the affidavits for a new trial, on the ground of the absence of a witness, did not shew any ground for believing that the absence was by the criminal contrivance of the successful party, the Court refused the rule. (*March* v. *Monckton*, H. T. 1836, Ex., 1 T. & G. 34). So, where a material witness for the plaintiff is withdrawn by the fraud and practice of the defendant or his attorney, the plaintiff is bound to apply to the Court to put off the trial or withdraw his record, and if he proceed and be nonsuited, the Court will not grant a new trial. (*Turquand* v. *Dawson*, H. T. 1835, Ex., 1 C., M. & R. 709). Where a party made an affidavit, used on a motion for a new trial, and an office copy was upon summons admitted to be a true copy:—Held, that the party being called as a witness on the second trial, might be cross-examined upon the office copy, without producing the original affidavit. (*Davies* v. *Davies*, 1840, N. P. 9 C. & P. 252).

† Where the jury found a verdict in opposition to the evidence of a witness, and the credibility of the witness is left to the jury, the Court will not grant a

The Court will consider the case as if it had gone to the jury with that direction, and such acquiescence therefore is not a ground for refusing a new trial.

ground for a new trial*; though acquiesced in by counsel;

LE FLEMING *v.* SIMPSON, M. T. 1827. K. B. 1 *M. & Ry.* 269.

IN trover, upon the plaintiff's evidence the Judge intimated a strong opinion in favour of the defendant, upon a point decisive of the cause, and in consequence of such intimation the defendant's counsel omitted to call evidence in support of a different point intended to be raised by way of defence—

as, where the Judge expresses a strong opinion on a point which stops the cause†,

The Court directed a new trial only; but refused to order a verdict to be entered for the plaintiff.

GREGORY *v.* TUFFS, T. T. 1834. Ex. 1 *C., M. & R.* 310; S. C. 2 *D. P. C.* 711.

IN an action for penalties for keeping an unlicensed house for music and dancing, &c., the evidence for the plaintiff was clear and positive, and might, if it was false, have been answered by the evidence on the other side, the jury requested to have the act of Parliament handed up to them, with which they retired to consider their verdict, and found in favour of the defendant.

or where he allows the jury to retire with an act of Parliament;

The Court under these circumstances granted a rule for a new trial, considering that the jury must have put a misconstruction upon the statute, and that it was equivalent, therefore, to a misdirection, on which ground alone a new trial, in such an action, is usually granted.

TINKLER *v.* ROWLAND, H. T. 1836. K. B. 4 *Ad. & E.* 868.

IN trespass quare clausum fregit, issues were joined on the pleas, 1. Of a public carriage-way; 2. Of a public bridle-way; 3. Of a public footway. The jury found a verdict for the plaintiff on the first issue, and for the defendants on the third; and the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on the second issue.

or where the Judge improperly discharges the jury as to one issue.

The Court granted a new trial, although the plaintiff at the beginning of the trial had agreed that the damages, if any, should be merely nominal.

DOE *d.* SMITH *v.* PIKE, H. T. 1833. K. B. 1 *N. & M.* 385.

ON motion for a new trial, on the ground that the Judge had submitted evidence to the jury, upon which the verdict could only have been found one way—

But no ground because the Judge put the

new trial, though there was nothing to impeach the credit of the witness. (*Lacey* v. *Forrester*, E. T. 1835, Ex., 3 D. P. C. 668).

* An improper amendment by the Judge is no ground for a new trial. (*Cox* v. *Painter*, E. T. 1837, K. B., 6 Ad. & E. 491; see ante, tit. *Amendment*).

† It is no ground for a new trial that the Judge, in his summing up, omits specially to leave to the jury a point made in the course of the trial, if the whole case was substantially left to them. (*Robinson* v. *Gleadow*, T. T. 1835, C. P., 2 Scott, 250; S. C. 2 Bing. N. S. 156). The alleged immateriality of evidence improperly admitted is not a ground for refusing a new trial, unless the Court can see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict given upon the remainder of the evidence must have been set aside as against evidence. (*De Rutzen* v. *Farr*, M. T. 1835, K. B., 5 N. & M. 617).

evidence without an alternative*,

The Court said, that was not such misdirection as to induce them to vary the rule as to costs on a new trial granted, as upon a verdict against evidence.

GODMANCHESTER *v.* PHILLIPS, M. T. 1835. K. B. 4 *Ad. & E.* 550.

or omitted to tell the jury a presumption of law.

AN inclosure act directed that commissioners should award to a corporation, who were owners of the soil of certain commons, a twentieth part of the commons by way of compensation. In an action of trespass by the corporation, the plaintiffs having given evidence of acts of ownership in the locus in quo, the defendants to shew that their right to it had been compensated for by allotments made by commissioners, gave evidence that these allotments amounted to a twentieth part of the commons. In contradiction to this evidence, plaintiffs proved that a part of the land, which they alleged to be the common, consisted of a strip of uncultivated land between the cultivated parts of the common and the lands of private proprietors, called walks; and plaintiffs gave some evidence of property in these walks. The Judge having left the question of property in the locus in quo generally to the jury, who found for the plaintiffs—

The Court held, that it was not a ground for a new trial, that the Judge did not tell the jury that, in presumption of law, the walks belonged to the owners of the adjacent land, unless the contrary were proved.

(*g*) CONCERNING THE JURY.

SAVILLE *v.* LORD FARNHAM, E. T. 1828. K. B. 2 *M. & Ry.* 216.

An affidavit by a juryman, that he objected to the verdict, cannot be produced for a new trial†.

THE Judge being of opinion that the plaintiff had made out no title, directed a verdict for the defendant, and the jury being present, and no objection made at the time of entering the verdict—

The Court refused an application for a new trial, on the affidavit of a juror that he had not concurred in the verdict.

* Where the question is one of mere fact, it seems that no expressions of the Judge, however strong or erroneous, will amount to misdirection, provided the question be upon the whole fairly presented to the jury. (*Foster* v. *Sleete*, H. T. 1837, C. P., 5 Scott, 28). Semble, where a number of facts, *which singly* may be ambiguous, amount collectively to an unequivocal proof of a fact, e. g. the surrender of a term, a Judge is not bound to submit them formally to the jury, unless the counsel expressly desires it. (*Reeve* v. *Bird*, 1 C., M. & R. 31; 4 Tyrw. 612). It is no ground for a new trial for misdirection that the Judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, when the question is one peculiarly for their consideration. (*Belcher* v. *Prittie*, 4 M. & Scott, 295; 10 Bing. 408). Where a jury had not acted according to a misdirection, but had given damages, the Court refused to grant a new trial on the ground of misdirection. (*Twigg* v. *Potts*, T. T. 1834, Ex., 1 C., M. & R. 89).

† So, on a motion for a new trial the Court will not receive an affidavit by the attorney of an admission made to him by one of the jurymen that the verdict was decided by lot. (*Straker* v. *Graham*, H. T. 1839, Ex., 4 M. & W. 721). But, where a jury have misconducted themselves in their demeanour during the trial in such a way as to lead to the presumption that justice has not been properly administered, the Court will grant a new trial. (*Hughes* v. *Budd*, H. T. 1840, B. C., 8 D. P. C. 315). So, the Court would grant a new trial in a case where a juror had, before being sworn, declared his determination as to the verdict he should give. (*Ramadge* v. *Ryan*, M. T. 1832, C. P., 9 Bing. 333; S. C. 2 M. &

(*h*) Concerning negligence or conduct of the attorney.

Moody *v.* Dick, H. T. 1835. K. B. 4 *N. & M.* 348.

The Court refused a new trial, merely on an affidavit that the defendant had been kept by his attorney in ignorance of the action; and that he had a good defence on the merits, but that the verdict had gone against him through the negligence of his attorney, the remedy being against the latter.

Negligence of attorney no ground*.

(*i*) Concerning particulars of demand.

Breckon *v.* Smith, M. T. 1830. K. B. 1 *Ad. & E.* 488.

On a declaration for goods sold, and a particular "for a beast sold, 13*l.* 10*s.*;" the only evidence was an admission by the defendant to a third person that he owed the plaintiff 13*l.* 10*s.*

The Court held, there was no evidence of an account stated, nor on the count for goods, as applying to the particular; but a new trial granted on payment of costs, with leave to amend the particulars.

New trial granted to amend particulars†.

(*j*) Concerning Perjury.

Proctor *v.* Simmons, M. T. 1824. C. P. 9 *Moore*, 581.

On motion for a new trial—

The Court held, that suggestion of perjury in the witnesses is not

Perjury no ground;

Scott, 421). And, where two issues were raised by the pleadings, and the jury found upon both, but the Judge before whom the cause was tried discharged the jury upon the second issue, under misapprehension that the verdict upon one issue rendered the other issues immaterial. The Court held, that the proper course was not to move for a new trial, but to apply to a Judge to have the verdict corrected according to his notes. (*Iles* v. *Turner*, M. T. 1834, Ex., 3 D. P. C. 211). The Judge at Nisi Prius told the jury, that, in case of their believing a fact, the verdict must be for the plaintiff; the jury afterwards returned into court and told the associate, who alone was there, that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so, but the jury expressed to him their dissent, and said that they were not agreed to find for the plaintiff. The Court discharged a rule nisi obtained on affidavit of these facts for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff. (*Doe* d. *Lewis* v. *Baster*, H. T. 1836, K. B., 5 Ad. & E. 129).

* The fact of the person acting as deputy for the sheriff being the attorney for the defendant, is not a ground for obtaining a new trial. (*Briggs* v. *Sowton*, M. T. 1840, B. C., 9 D. P. C. 105).

† So, where the particular of demand is so framed as to be calculated to mislead the defendant, the Court granted a new trial on payment of costs. (*Stevens* v. *Willingale*, M. T. 1836, C. P., 4 Scott, 235; S. C. 7 C. & P. 702). But, where particulars of demand stated that the action was brought to recover the deposit paid on the sale of an estate, to which the defendant was unable to make a good title, a summons was taken out for better particulars, which was dismissed upon the plaintiff's attorney stating that the objections were matter of law only. Subsequently a notice was delivered to the defendant's attorney that the objections were set forth in the plaintiff's answer to defendant's bill in Chancery. At the trial it appeared that the only objection was matter of fact. The Court refused a new trial; the defendant's attorney declining to make affidavit that he had been misled. (*Correll* v. *Castle*, E. T. 1837, B. C., 5 D. P. C. 598).

a sufficient ground for a new trial on an action for an assault, where the defendant does not swear that he was taken by surprise at the trial.

SEELEY *v.* MAYHEW, M. T. 1827. C. P. 4 *Bing.* 561.

or that a witness has been indicted for perjury.

MOTION for a new trial, on the ground that a witness on the trial had been indicted for perjury—

But the Court refused the rule.

(*k*) CONCERNING TRIAL, NOTICE OF.

LENEHAM *v.* GOOLD, M. T. 1835. Ex. 4 *D. P. C.* 371; S. C. 1 *T. & G.* 228.—S. P. KERRY *v.* REYNOLDS, T. T. 1835. B. C. 4 *D. P. C.* 234.

Eight days' instead of fourteen days' notice of trial, is no ground for a new trial*.

THE ground of an application for a new trial was, that the defendant's residence was and for some time had been in Ireland, and that he ought to have had fourteen instead of eight days' notice of trial.

The Court refused the rule; it not appearing that, whilst resident in London, he was not permanently resident there.

(*l*) CONCERNING CAUSES BEING TRIED AS UNDEFENDED, BY MISTAKE.

BREACH *v.* CASTERTON, E. T. 1831. C. P. 7 *Bing.* 224; S. C. 4 *M. & P.* 867.

A cause being tried as undefended through inattention of defendant's attorney no ground,

ON motion for a new trial, it appeared that the attorney had permitted the cause through inattention to be called on, and tried as an undefended cause.

The Court refused to grant a new trial, although it was sworn that there was a good defence upon the merits.

WATSON *v.* REEVE, M. T. 1838. C. P. 7 *D. P. C.* 127; S. C. 5 *Bing. N. S.* 112; S. C. 6 *Scott*, 783.

especially where the verdict only 7*l.*†

ON motion for a new trial, it appeared that one of the defendants was in court when the cause was called on in its turn and tried as an undefended cause, being eighth on the list, no briefs having been delivered and the verdict being for 7*l.*

The Court refused a new trial on any terms.

* But, where a verdict was obtained in the absence of the defendant on account of no notice of trial being given, the Court set aside the verdict though the defendant did not swear positively to a good defence on the merits. (*Williams* v. *Williams*, H. T. 1834, Ex., 2 D. P. C. 350).

† And the Court refused a new trial on any terms, where the defendant had not appeared and no briefs had been delivered by his attorney. (*Gwilt* v. *Crawley*, M. T. 1831, C. P., 8 Bing. 144; S. C. 1 M. & Scott, 229). But, after verdict for the plaintiff in debt on bond, (the defendant not appearing at the trial), the Court granted a new trial, on the ground that in the issue delivered the pleas were not dated pursuant to the rule of Hilary Term, 4 Will. 4. (*Worthington* v. *Wigley*, T. T. 1837, C. P., 3 Scott, 555; sed qu., see tit. *Issue*). So, where a cause which stood thirty off was taken out of its turn as undefended in the absence of the defendant's attorney, who was casually absent, no notice having been

(*m*) Concerning verdict by supposed consent.

Wright *v.* Soresby, E. T. 1834. Ex. 2 *C. & M.* 671; S. C. 4 *Tyrw.* 434.

A verdict by consent was taken against a defendant who was present in Court, against his express instructions and directions given privately in Court to his counsel, but he did not openly dissent or communicate his refusal to the other side—

Verdict by supposed consent no ground.

The Court refused to interfere.

III. RELATIVE TO TRIALS BEFORE THE SHERIFF.

Tayler *v.* Helps, M. T. 1833. K. B. 5 *B. & Ad.* 1068.—S. P. Edwards *v.* Dignam, E. T. 1834. Ex. 2 *D. P. C.* 642.

On motion for a new trial—

The Court held, that the general rule of not granting new trials in cases under 20*l.* does not apply to trials before sheriffs.

The rule as to verdict for 20*l.* does not apply to trials before sheriff*,

Packham *v.* Newman, M. T. 1834. Ex. 1 *C., M. & R.* 585; S. C. 5 *Tyrw.* 215.—S. P. Williams *v.* Evans, T. T. 1837. Ex. 2 *M. & W.* 220.—S. P. Fleetwood *v.* Taylor, T. T. 1838. B. C. 6 *D. P. C.* 996.

On motion for a new trial—

The Court said, in the case of a writ of trial, no new trial will be granted, on the ground of the verdict being against evidence, when the verdict is for less than 5*l.*

but the verdict must not be less than 5*l.*†

given that it would be taken as an undefended cause, the Court set the verdict aside and granted a new trial, the costs to abide the event. (*Aust* v. *Fenwick*, M. T. 1833, Ex., 2 D. P. C. 246). So, where a cause, in which counsel had been instructed for defendant, having been called on out of its turn, upon an allegation of plaintiff's counsel that it was undefended, a verdict was taken for plaintiff before defendant's counsel arrived, the Court granted a new trial; the costs of the application to abide the event of the cause. (*Darrien* v. *Howell*, H. T. 1840, C. P., 8 D. P. C. 277; S. C. 6 Bing. N. S. 245; S. C. 8 Scott, 508). And where a plaintiff gave notice that he should take the cause down to trial as an undefended cause, and when it was called on the defendant's counsel said it was defended, whereupon it was not tried, but the plaintiff again took the record and got the cause tried as undefended, without any new notice or setting it down in the paper, the Court granted a new trial without payment of costs. (*Sprigge* v. *Rutherford*, M. T. 1833, B. C., 2 D. P. C. 429).

* In another case it was said that the rule as to not granting new trials where the verdict is under 20*l.* applies to cases tried before the sheriff. (*Hemming* v. *Parnel*, T. T. 1832, C. P., 3 M. & Scott, 318). Upon a trial under the Writ of Trial Act, in an action on a promissory note, semble, that the note should be produced; but if the objection was not taken at the time, the non-production of the note is no ground afterwards for a new trial. (*Henn* v. *Neck*, M. T. 1834, Ex., 3 D. P. C. 163). A declaration on a bill of exchange alleged the acceptance to be payable at a certain place, and "not elewhere;" on application to the sheriff to amend the declaration by striking out the words "not elsewhere," he refused. The Court granted a new trial. (*Higgins* v. *Nichols*, H. T. 1839, B. C., 7 D. P. C. 551).

† Where, on the trial before the sheriff of an action on a note under 5*l.*, the requisites of the 17 Geo. 3, c. 30, not having been complied with, the undersheriff directed the jury to find for the defendant; but they found that the money

HALL *v.* MIDDLETON, H. T. 1835. K. B. 4 *N. & M.* 368; S. C. 4 *Ad. & E.* 107.—S. P. MANSFIELD *v.* BREAREY, T. T. 1830. K. B. 1 *Ad. & E.* 347.—S. P. BURNEY *v.* MANSON, T. T. 1830. K. B. 1 *Ad. & E.* 348, n.

The sheriff's notes should be produced on moving*,

UPON application for a new trial before the sheriff—

The Court requires that he should have been applied to for his notes, which, if furnished, should be produced; but if not, that such refusal and the facts of the case be laid before the Court upon affidavit.

JOHNSON *v.* WELLS, H. T. 1834. Ex. 2 *C. & M.* 428; S. C. 2 *D. P. C.* 352; S. P. MANSFIELD *v.* BREAREY, T. T. 1830. K. B. 1 *A. & E.* 347; S. P. GRAINGE *v.* SHOPPEE, E. T. 1834. Ex. 2 *D. P. C.* 644; S. C. 4 *Tyrw.* 1000.

and an affidavit verifying them†.

ON a motion for a new trial, where the cause had been tried before the sheriff—

The Court held, that it should be made on an affidavit, verifying the under-sheriff's notes; and where certified under his seal only, it was insufficient.

WHEELER *v.* WHITMORE, T. T. 1835. Ex. 4 *D. P. C.* 235.—S. P. MUPPIN *v.* GILLATT, T. T. 1835. Ex. 4 *D. P. C.* 190.

The motion must be made within four days.

ON motion for a new trial—

The Court said, a motion for a new trial must, in all cases, be made within the four days, even though the case may have been

"is due, but that there is an informality in the note:"—Held to be a perverse verdict, and a new trial granted. (*Owen* v. *Pugh*, H. T. 1836, Ex., 1 T. & G. 26).

* In another case it was said, on a motion for a rule nisi to set aside the verdict found on a trial before the sheriff on a writ of trial, the Court will not require the production of the sheriff's notes, if the motion be made by counsel engaged at the trial. (*Barnett* v. *Glossop*, E. T. 1835, C. P., 3 D. P. C. 625).

If a sheriff, before whom a trial takes place under 3 & 4 Will. 4, c. 42, s. 17, does not, after promising to do so, send his notes of the trial within the time proper for moving for a new trial, the Court will enlarge the time for moving, and permit the facts proved at the trial to be laid before it on affidavit. (*Thomas* v. *Edwards*, T. T. 1834, Ex., 1 C., M. & R. 382; S. C. 2 D. P. C. 664; S. C. 4 Tyrw. 825). Upon trials before the sheriff, neither party is entitled to the sheriff's original notes for the purpose of making a motion for a new trial. (*Vakers* v. *Cocks*, H. T. 1835, Ex., 3 D. P. C. 492). If an under-sheriff refuses to transmit his notes taken on the trial of an issue, the Court will compel him to pay the costs consequent on his refusal. (*Metcalf* v. *Parry*, T. T. 1834, B. C., 2 D. P. C. 589); but he is not answerable for his agent's conduct in withholding them, unless it is shewn that the latter acted under his direction. (*Metcalf* v. *Parry*, M. T. 1824, B. C., 3 D. P. C. 93).

† A new trial having been moved for upon an affidavit verifying the under-sheriff's notes:—Held, that an affidavit might be filed on the other side containing statements of evidence given at the trial, but not reported in the notes of the under-sheriff. (*Lilley* v. *Johnson*, E. T. 1837, Ex., 5 D. P. C. 606; S. C. 2 M. & W. 386). Where a rule for a new trial is moved for on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits. (*Jones* v. *Howell*, T. T. 1835, Ex., 4 D. P. C. 176). On moving to set aside a verdict on a trial before the under-sheriff, on an objection founded upon the pleadings, it is not necessary to have an affidavit of the pleadings, as the postea is supposed to be in Court. (*Milligan* v. *Thomas*, M. T. 1835, Ex., 2 C., M. & R. 756; S. C. 4 D. P. C. 373; S. C. 1 T. & G. 134).

tried before the sheriff in a distant county. If the four days are insufficient a special application must be made to the Court for further time.

IV. RELATIVE TO TRIAL IN INFERIOR COURTS*.

V. RELATIVE TO THE COURT TO WHICH APPLICATION IS TO BE MADE†.

VI. RELATIVE TO THE TIME WITHIN WHICH APPLICATION MUST BE MADE.

Reg.-Gen., M. T. 1830. C. P. 6 *Bing.* 622.

By rule, motions for new trials require to be actually made within the first four days of Hilary and Trinity terms. The motion must be made within four days‡,

Aymes *v.* Lettice, H. T. 1840. Ex. 8 *D. P. C.* 202; S. C. 6 *M. & W.* 216.—S. P. Mason *v.* Clarke, E. T. 1831. Ex. 1 *C. & J.* 411; S. C. 1 *Tyrw.* 534.

On motion for a new trial—

The Court held, that if the motion be made within four days after the return of the distringas it is sufficient, although more than four days after the trial. or within four days after return of distringas.

* The practice requiring the notes of the sheriff, or the judge of an inferior court of record, on moving for a new trial, does not apply to cases before the recorder of Chester. (*Lawlor* v. *Clements*, T. T. 1840, B. C., 8 D. P. C. 688). An inferior court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict. (*Rex* v. *Oxford* (*Mayor*), T. T. 1834, K. B., 3 N. & M. 877).

† Although, under 4 & 5 Will. 4, c. 62, the application for a new trial of a cause in C. P. Lancaster may be made to any one of the superior courts at Westminster; yet it should be made to that court of which the judge who tried it is a member. (*Foster* v. *Jolliffe*, H. T. 1834, C. P., 1 Scott, 54; S. P. *Foster* v. *Jolly*, H. T. 1835, Ex., 1 C., M. & R. 703; S. C. 5 Tyrw. 289). On issues out of Chancery, the motion for a new trial ought first to be made in that Court. (*Stone* v. *March*, H. T. 1827, K. B., 8 D. & R. 71).

‡ The motion for a new trial of a cause tried out of term must be made within four days of the term next ensuing the trial. (*Weston* v. *Foster*, H. T. 1836, C. P., 2 Bing. N. S. 693). Where a motion for a new trial is by accident delayed beyond the four days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party delaying to move. (*Lester* v. *Lazarus*, M. T. 1835, Ex., 4 D. P. C. 444). A motion for a new trial, made within the four days, but in the wrong Court:—Held, a compliance with the rule, and, under the circumstances, the rule which had been obtained to stand as of the right Court. (*Piggott* v. *Kemp*, E. T. 1833, Ex., 2 D. P. C. 20). An application for a new trial, in a cause tried on a writ of trial in vacation, must be made within the first four days of the following term; and if the notes of the trial cannot be procured, an application must be made within the four days for further time to make the application. (*Williams* v. *Andrews*, M. T. 1840, B. C., 9 D. P. C. 122). If a motion for a new trial is made after the first four days of term, pursuant to permission granted by the Court, the party applying must give notice of that fact to the other side, or it will be regular to sign judgment on the fifth day of the term, before the motion has been made. (*Doe* d. *Duncan* v. *Edwards*, H. T. 1839, B. C., 7 D. P. C. 547).

VII. RELATIVE TO THE MOTION AND RULE FOR, AND NOTICE OF.

LAWSON *v.* BRITTON, T. T. 1825. Ex. 1 *M. & Y.* 508.

An omission to give instruction to counsel no ground for opening the rule*.

A RULE had been granted for a new trial, but counsel did not appear to support it. On motion to open the rule, stating that, although instructions had not been delivered to him, the attorney asserted that they had been prepared and intended for delivery previous to the day fixed for the argument in Easter term.

The Court, however, said that they had already done more than they were authorized to do, in suffering the judgment and execution to be delayed so long, and refused the application.

VIII. RELATIVE TO THE NOTES OF COUNSEL†.

IX. RELATIVE TO IMPOSING TERMS, AND IN CASE OF DEATH AFTER RULE FOR.

THWAITES *v.* SAINSBURY, T. T. 1831. C. P. 7 *Bing.* 437; S. C. 5 *M. & P.* 321.

If granted on one point it will be limited to that‡.

ON motion for a new trial, it appeared that the question at the trial was reduced to a single point, and a new trial was moved for on that ground.

The Court in granting it will restrain the parties to the same point of inquiry.

* If a motion for a new trial is made after the first four days of term, pursuant to permission granted by the Court in consequence of the pressure of business, the party applying must give notice of that fact to the other side, or it will be regular to sign judgment on the fifth day of the term, before the motion has been made. (*Doe* d. *Duncan* v. *Edwards*, H. T. 1839, B. C., 7 D. P. C. 547).

Where the Court had granted a rule for a new trial, a second application to restrict a Judge's order in the same cause, to come on at the same time, refused. (*Robertson* v. *Baker*, E. T. 1833, Ex., 2 D. P. C. 39).

The Court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it; therefore, the Court may look at the record, on an application to set aside an award made pursuant to an order of Nisi Prius, although the rule is not drawn up on reading it. (*Sherry* v. *Oke*, H. T. 1835, B. C., , 3 D. P. C. 349).

While a rule nisi was pending for a new trial in an action for invading the plaintiff's patent, the defendant sued out a sci. fa. for the purpose of trying the same right, but the Court would not defer the discussion of the rule until a decision on the sci. fa. should be obtained. (*Haworth* v. *Hardcastle*, E. T. 1834, C. P., 2 D. P. C. 802; 10 Bing. 551; S. C. 4 M. & Scott, 448).

If the question between the parties at the trial be for how long a period certain credit was given, and it is assumed on both sides that calendar months were meant, and the case left to the jury on that assumption, a party will not be allowed afterwards, in shewing cause against a rule for a new trial, to avail himself of the presumption of law, that, as no particular kind of months was mentioned, lunar ones must be intended. (*Webb* v. *Fairmaner*, E. T. 1837, Ex., 6 D. P. C. 493; S. C. 4 M. & W. 473).

The Court will not order a party to permit his opponent in the cause to inspect and take a copy of a deed of conveyance with a view only to the discussion of a rule for a new trial. (*Wood* v. *Morewood*, M. T. 1840, C. P., 9 D. P. C. 44; S. C. 2 Scott, N. S. 204).

† Where a counsel has been present at the trial of an issue on a writ of trial, the Court will take a statement of what occurred at the trial from the counsel on moving to set aside the verdict, without the production of the notes taken by the presiding officer. (*Flower* v. *Adams*, H. T. 1840, B. C., 8 D. P. C. 292).

‡ Where a rule nisi for a new trial is granted on the terms of bringing the amount of the verdict into Court, the money must be brought in before the rule nisi is drawn up. (*Clare* v. *Fiestel*, E. T., 1804, Ex., 2 D. P. C. 617).

GRIFFITH *v.* WILLIAMS, E. T. 1830. Ex. 1 *C. & J.* 47.

AFTER a verdict and rule nisi granted for a new trial the plaintiff died—

The Court imposed the terms of the verdict being entered as of the assize when the first trial was had, and of the defendant undertaking not to assign error.

Where, after rule for, plaintiff dies, the Court will impose terms*.

X. RELATIVE TO A TERM'S NOTICE.

DEACON *v.* FULLER, H. T. 1833. Ex. 1 *C. & M.* 349; S. C. 1 *D. P. C.* 675.

AFTER the Court has granted a rule for a new trial, and no proceedings are taken for four terms—

The Court held, that a term's notice of motion to discharge that rule is necessary.

After the expiration of four terms a term's notice is necessary.

XI. RELATIVE TO THE CHANGE OF THE ATTORNEY†.

XII. RELATIVE TO AMENDMENTS AFTER.

SWEETING *v.* HALSE, E. T. 1829. K. B. 4 *M. & Ry.* 383.

IN an action by the drawer against the acceptor, the name of the latter having been erased before the bill became due, and a new contract indorsed, but which was not stamped, and the declaration contained no count thereon—

The Court, after a verdict, and a new trial granted, refused to amend by adding a new count applicable to such new contract.

See also tit. Amendment—Declaration.

On a new trial the Court will not allow a new count to be added.

XIII. RELATIVE TO THE COSTS.

CANHAM *v.* FISK, M. T. 1831. Ex. 2 *C. & J.* 126; S. C. 2 *Tyrw.* 155.

UPON granting a new trial, costs to abide the event—

The Court of Exchequer said, they would follow the rule in K. B., that neither party have the costs of the first trial, unless the verdicts are for the same party.

Where to abide the event, the same party must have a verdict on each to have the costs of the first‡.

* After a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies, no cause can be shewn against the rule until there is a personal representative. (*Sloman* v. *Allen*, H. T. 1840, C. P., 1 M. & G. 96, n.).

† It is no ground for treating a rule nisi for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record, without an order to change the attorney. (*Doe* v. *Branson*, E. T. 1838, B. C., 6 D. P. C. 490).

‡ If, after a verdict for defendant, and a new trial obtained, he again succeeds, he is entitled to costs of both sides; but if the plaintiff succeeds, he is only entitled to the costs of that trial. (*Pasley* v. *Mellard*, E. T. 1830, Ex., 1 Tyrw. 260). So, costs of the defendant's application for a new trial on the

PEACOCK *v.* HARRIS, M. T. 1836. K. B. 1 *N. & P.* 240.

Where rule is silent, plaintiff not entitled to costs of first trial*,

AFTER a new trial, granted on the ground of the reception of improper evidence, and a special jury moved for, the defendant withdrew his plea, and suffered judgment by default, and damages were assessed.

Held, that, the rule for a new trial being silent as to costs, the plaintiff was not entitled to the costs of the first trial.

REG. GEN. H. T. 2 WILL. 4, K. B. *C. P. & Ex.*

though he succeeds†;

IT is ordered that, if a new trial be granted without any mention of costs, the costs of the first trial shall not be allowed to the successful party, though he succeeds on the second.

CRAVEN *v.* SAUNDERSON, M. T. 1838. Q. B. 8 *Ad. & E.* 897; S. C. 1 *N. & P.* 666.

and this applies to proceedings in prohibition.

UPON a new trial granted, without mention of costs in the rule—The Court held, that the rule, that the costs of the first trial shall not be allowed, although the party succeed again on the second trial, applies to issues in prohibition, since 1 Will. 4, c. 21, s. 1.

GRAY *v.* COX, E. T. 1826. K. B. 5 *B. & C.* 458.—S. P. SWEETING *v.* HALSE, K. B. 9 *B. & C.* 369.

And where, after verdict for plaintiff, new trial was granted, but no mention of costs, the plaintiff discon-

AFTER verdict for plaintiff, a new trial was granted; but the plaintiff discontinued. Whereupon the Master, in his taxation of costs, allowed the defendant the costs of the former trial. A rule having been obtained for the Master to review his taxation—

Per Cur.—It is a settled rule that a party can never have the costs of a trial in which he has been defeated. (*Trelawney* v. *Thomas*, 1 H. Bl. 641; *Austen* v. *Gibbs*, 8 T. R. 619). Suppose then

ground of breach of faith, though the rule was opposed by defendant—Held to be properly allowed; the plaintiff not having applied for them originally, they must be taken as costs in the cause. (*Truslove* v. *Burton*, H. T. 1825, C. P., 10 Moore, 96). Where, after a verdict for plaintiff, a new trial was directed upon the terms of the costs of the former trial to abide the event, the defendant having obtained the verdict in the second trial—Held, that he was entitled only to the costs of the new trial. (*Sherlock* v. *Barnard*, H. T. 1831, C. P., 8 Bing. 21; S. C. 6 M. & P. 58).

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial with reference to those given on the first. (*Wilkinson* v. *Malin*, E. T. 1833, Ex., 2 D. P. C. 65). But where the jury, not agreeing, are discharged by the Judge of his own authority, the party ultimately successful is not entitled to the costs of the first attempt at trial. (*Waite* v. *Spurgin*, H. T. 1836, B. C., 4 D. P. C. 575). In the Court of Queen's Bench, if a trial has been granted on payment of costs, the Court will not point out in the rule a particular day on which the costs must be paid. (*Bland* v. *Warren*, M. T. 1837, B. C., 6 D. P. C. 21).

* Where nothing is said as to costs upon a new trial granted, the Court cannot give them to the successful party. (*Newberry* v. *Colvin*, M. T. 1833, B. C., 2 D. P. C. 415).

† Where a party, before the new Rules of H. T. 2 Will. 4, succeeded on two trials:—Held, that he was entitled under the old rules to the costs of both, and also of entering up judgment nunc pro tunc, he not having been the cause of the delay. (*Carlisle* v. *Garland*, T. T. 1832, C. P., 9 Bing. 85).

the cause had gone to a second trial, and the defendant had succeeded, he could not have obtained the costs of the former trial. That being the practice of the Court, it is difficult to find a reason why the defendant should be in a better situation, because the plaintiff does not choose to have the cause tried a second time. Indeed *Howarth* v. *Samuel*, (1 B. & Ald. 566), is an express authority against him.

tinued:—Held, defendant was not entitled to costs.

DE RUTSEN *v.* LLOYD, E. T. 1837. K. B. 5 *Ad. & E.* 463; S. C. 2 *N. & P.* 213.

THE defendant had obtained a rule for a new trial, without mention of costs, and which was drawn up; it was afterwards abandoned by him.

The Court directed the plaintiff to have the postea delivered to him, and to have the costs of the trial; but refused the costs of the rule, and application for the postea and costs to plaintiff.

Where rule abandoned, plaintiff not entitled to costs of rule.

CREASE *v.* BARRETT, M. T. 1825. Ex. 2 *C., M. & R.* 738; S. C. 1 *T. & G.* 112.

UPON a new trial granted on terms that portions of the evidence given on the former trial should be admitted, the plaintiff obtaining the verdict.

The Court held, that he was not entitled to the costs of the copies of the short-hand writer's notes. It seems he ought to have applied to the Judge's clerk for a copy of the notes.

The plaintiff is not entitled to the costs of fair copies of short-hand writer's notes.

LORD *v.* WARDLE, M. T. 1837, C. P. 6 *D. P. C.* 174; S. C. 3 *Scott*, 398.

UPON a rule obtained for a new trial on payment of costs—

The Court held, that the costs of admitting documents used on the first trial were costs in the cause, there being no necessity for fresh admissions; but that the costs of preparing briefs and of full fees should be allowed as costs of the trial, regard being had by the Master to necessary amendments.

But costs of briefs for, allowed, but not for fresh admissions.

ROBINSON *v.* DAY, M. T. 1833. K. B. 2 *N. & M.* 670.

UPON a new trial being granted on payment of costs—

The Court held, that the remanet fees were costs taxable, and to be included by the Master.

Remanet fees are included.

XIV. RELATIVE TO JUDGMENT.

BLEWITT *v.* TREGONING, H. T. 1836. K. B. 5 *D. P. C.* 404; S. C. 4 *Ad. & E.* 1002.

THE plaintiff had obtained a verdict, and the defendant a rule nisi for a new trial, which, after the lapse of a year, was discharged; and the defendant in the interval died.

The Court ordered judgment to be entered nunc pro tunc, although

Where a rule is discharged after death of a party judgment will

be entered nunc pro tunc*.

more than two terms had elapsed after discharging the rule, the delay arising from the taxation of the costs, and no fault in the plaintiff.

KEY *v.* GOODWIN, T. T. 1832. C. P. 1 *M. & Scott*, 620.

So, where death takes place during time cause ordered to stand over.

AFTER a rule nisi for a new trial, the cause stood over to await the result of another cause, and in the interim the defendant died.

The Court directed judgment to be entered nunc pro tunc, although after the lapse of two years-and-a-half.

XV. RELATIVE TO A THIRD TRIAL.

FOSTER *v.* STEELE, T. T. 1836. C. P. 3 *Bing. N. S.* 892.

Where, on application for a third trial, the Court are divided, the rule will be discharged.

ON a question of seaworthiness, a new trial had been granted, on the ground of the verdict for the plaintiff being against the weight of evidence; and the jury again, on the same evidence, found for the plaintiff.

The Court were equally divided on an application for a third trial, and the rule therefore discharged.

Nil Debet, or never indebted, Plea of.

See tits. *Contract—Goods sold—Work and Labour.*

REG. GEN., H. T. 4 Will. 4. K. B., C. P., and Ex.

By Rule H. T. 4 Will. 4, nil debet is abolished.

IT is ordered, that the plea of "nil debet" shall not be allowed in any action.

In actions of debt, or simple contract, other than on bills of exchange and promissory notes, the defendant may plead, that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

SMEDLEY *v.* JOYCE, M. T. 1835. Ex. 2 *C., M. & R.* 721; S. C. 4 *D. P. C.* 421; S. C. 1 *T. & G.* 84.

And "never did owe" is a bad plea.

IN debt, the defendant pleaded that he *never did owe* to the plaintiff the said sum of 300*l.*, as in the declaration alleged, or any part thereof, in manner and form, &c.; and of this he puts himself upon the country. Demurrer, because, according to the Rules of Hilary Term, 4 Will. 4, the plea should have alleged that the defendant never was indebted in manner and form, &c.

The Court gave judgment for the plaintiff.

* Where the defendant obtained a verdict satisfactory to the Judge, the Court refused an application at the instance of the plaintiff to stay the judgment until trial of another action under similar circumstances pending, and which had been withdrawn from the cause list, with a view to obtain additional evidence. (*Yates Dublin Steam Packet Company*, E. T., 1840, Ex., 8 D. P. C. 402; S. C. 6 M. & W. 77; abridg. ante, tit. *Judgment*).

EDGINTON *v.* TOWN, M. T. 1827. C. P. 1 *M. & P.* 276.

THE plea nil debet concluded that the defendant did not owe the said sum of 10*l.* above demanded, being the damages, and not the sum demanded, and the plaintiff signed judgment as for want of plea.

The Court set it aside, but without costs, and on an undertaking to bring no action.

But judgment cannot be signed on a plea that the defendant does not owe the damages.

COUSINS *v.* PADDON, M. T. 1835. Ex. 2 *C., M. & R.* 547.

To an action of debt for goods sold, and work and labour, the defendant pleaded nunquam indebitatus. On a question arising as to what facts might be given in evidence under that plea—

Parke, B., said, The old law certainly permitted the defendant to avail himself, on the general issue pleaded to an indebitatus count, of the defence that the work was improperly done, or the goods delivered not such as were contracted for; and we think the late Rules have not introduced any alteration in this respect. The defendant is entitled, under the plea of nunquam indebitatus to an action for the price of goods sold and delivered, &c., to shew either that there was no sale or delivery, or none such as to make him liable on the contract; so also, in an action for work and labour and materials, to shew that the work done, or materials provided, were not such as to render him liable to pay for them under the contract; and then he opens his liability to pay on a contract of another description, namely, on a quantum meruit.

Under nunquam indebitatus defendant may shew the goods were not such as contracted for, or the work not properly done, in an action for work and labour.

EDMUNDS *v.* HARRIS, M. T. 1834. K. B. 4 *N. & M.* 182; *semble overruled*, BROMFIELD *v.* SMITH, 1 *M. & W.* 542, *post*, p. 23, n.

IN an action of debt, for goods sold and delivered, the defendant pleaded nunquam indebitatus.

The Court held, that he could not give in evidence, under this plea, that the goods were sold on credit which had not expired.

But cannot it has been thought shew the credit not expired.

Nolle Prosequi.

BULLER *v.* MAPP, E. T. 1834. C. P. 10 *Bing.* 391; S. C. 4 *M. & Scott*, 258.

IN debt for penalties concluding to the plaintiff's damage, demurrer to the whole declaration for so concluding, and for not shewing whether the plaintiff proceeded in person or by attorney—

The Court refused to allow the plaintiff to enter a nolle pros. as to the damages, and proceed with the demurrer.

There can be no nol. pros. as to damages, on proceeding only on a demurrer*.

* But, where a verdict was taken against several defendants, after a communication to one that no evidence would be given against him, as he would be wanted as a witness for the plaintiff, the Court directed a nolle pros., although the assignee of the plaintiff became insolvent. (*Bloomfield* v. *Blake*, M. T., 1833, Ex., 2 D. P. C. 237).

To a declaration for goods sold and delivered, the defendant pleaded, first, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.*, part of the last-mentioned sum, payment before action brought; as to 18*l.*, further parcel of the said sum, payment into Court of that amount; as to the residue, a set-off. The plain-

BOWDEN *v.* HORNE, M. T. 1831. C. P. 7 *Bing.* 714.

A nol. pros. is a bar to a future action.

THE plaintiff on a declaration containing several counts, after the defendant had suffered judgment by default, entered upon the record a nol. pros. to some of the counts, and afterwards commenced an action on the subject to which such counts were applicable.

The Court held, that such nol. pros. after judgment was equivalent to a *retraxit* and a bar to any future action.

BOOTH *v.* MIDDLECOAT, T. T. 1830. C. P. 6 *Bing.* 445.

Under 8 Eliz., bankrupt defendant not entitled to costs.

IN an action of contract, one defendant having pleaded his bankruptcy, the plaintiff entered a nolle prosequi as to him.

The Court held, that such defendant was not entitled, under 8 Eliz. c. 2, to his costs.

But by 3 & 4 Will. 4, a nol. pros. entered as to one of several defendants,

BY 3 & 4 Will. 4, c. 42, s. 22, it is enacted, "That, where several defendants shall be made defendant in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the Judge before whom such cause shall be tried shall certify on the record under his hand that there was a reasonable cause for making such person a defendant in such action."

or one of several counts, entitles him to his costs.

By sect. 33, it is enacted, "That, where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for, and recover his reasonable costs in that behalf."

Non Assumpsit.

See tits. *Contract—Goods sold—Pleas—Work and Labour.*

COUSINS *v.* PADDON, M. T. 1835. Ex. 2 *C., M. & R.* 547.

Under the plea of non assumpsit* defendant

IN this case, *Parke*, B., said, before the new Rules the law permitted the defendant to avail himself, on the general issue pleaded to an indebitatus count, of the defence that the work was improperly done, or

tiff replied, accepting the 18*l.* in satisfaction, &c., taking no notice of the other pleas. The Court gave leave to the defendant to sign a judgment of nol. pros. unless the plaintiff amended his replication on payment of costs, or consented to taxation of costs, as upon a nolle pros., in respect of the unanswered pleas. (*Topham* v. *Kidmore*, T. T., 1837, K. B., 5 D. P. C. 676).

Trespass; pleas, first, not guilty, second, a justification. Replication and new assignment. Demurrer to replication and new assignment. 15*l.* damages on first issue, and nominal damages on the second. The plaintiff entered a nol. pros. to the new assignment, and obtained judgment on demurrer. The Court set aside the nol. pros. (*Strother* v. *Randerson*, M. T., 1836, B. C., 5 D. P. C. 280).

Where a nolle prosequi is entered on a plea, going to the whole cause of action, the defendant is entitled to judgment upon the whole record. (*Peters* v. *Croft*, M. T., 1838, C. P., 6 Scott, 897).

* By Rule H. T., 4 Will. 4, K. B., C. P., and Ex., it is ordered, that, in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise

the goods delivered not such as were contracted for; and we think the late Rules have not introduced any alteration in this respect. The defendant is entitled, under the plea of non assumpsit to an action for the price of goods sold and delivered, &c., to shew, either that there was no sale or delivery, or none such as to make him liable on the contract; so also, in an action for work and labour and materials, to shew that the work done or materials provided were not such as to render him liable to pay for them under the contract, and then he opens his liability to pay on a contract of another description, namely, on a quantum meruit.

may shew the goods were not such as contracted for, or the work badly done, &c.

Non est Factum, Plea of*. See ante, tits. *Bond—Covenant—Deed.*

alleged may be implied by law. Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; but, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. 2nd. In all actions upon bills of exchange and promissory notes the plea of non assumpsit shall be inadmissible. Under the general issue in assumpsit for goods sold, the defendant may be allowed to shew that they were sold on a credit not expired. (*Broomfield* v. *Smith*, E. T. 1836, Ex., 1 M. & W. 542; S. C. 1 T. & G. 929. See *Maude* v. *Nesham*, 3 M. & W. 502). So, under the general issue in assumpsit the defendant may shew that the contract was subject to conditions which have not been complied with. (*Alexander* v. *Gardner*, H. T. 1835, C. P., 5 Scott, 281; S. C. 1 Bing. N. S. 671; 3 D. P. C. 146).

If, in an action on a guarantie for payment of goods to be supplied to A., the plaintiff aver that goods were supplied to A., and the defendant plead non assumpsit, this admits the supply of the goods to A., and no proof is required in support of the averment, and the plaintiff need not give any evidence that the goods were supplied, except with a view of shewing the amount of damages. (*Taylor* v. *Hillary*, H. T. 1835, N. P., 7 C. & P. 30).

In assumpsit on an executory consideration, which, in the declaration, was alleged to have been performed:—Held, that it could not come into question on the general issue, but that, if the defendant meant to insist that any part of the consideration was unperformed, the point should have been raised on the pleadings. (*Gibson* v. *Harris*, 1837, N. P., 8 C. & P. 378; S. P. *Passenger* v. *Brooks*, T. T. 1834, C. P., 1 Bing. N. S. 587; S. C. 1 Scott, 560). In assumpsit for timber bargained and sold:—Held, that, if there were a false representation of its quality, it must be specially pleaded; and that if, upon the issue whether the timber was sound or not, that word have a technical meaning in the timber trade, evidence of its meaning by the custom of the timber trade was admissible. (*Woodhouse* v. *Swift*, 1836, N. P., 7 C. & P. 310). Before Rule T. T. 1 Vict., payments which did not amount to a bar to the action, but merely to reduce the plaintiff's demand, need not have been specially pleaded, but might be given in evidence in mitigation of damages under a plea of non assumpsit. (*Lediard* v. *Bouchier*, H. T. 1835, N. P., 7 C. & P. 1; S. P. *Shirley* v. *Jacobs*, E. T. 1835, C. P., 7 C. & P. 3, n.; see post, tit. *Payment*).

* By Rule H. T., 4 Will. 4, it is ordered, that, in debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the

Non-Joinder.

See tit. *Coverture.*

By 3 & 4 Will. 4, the plea must shew that the party is within the jurisdiction of the Court, and be supported by affidavit.

By 3 & 4 Will. 4, c. 42, s. 8, it is enacted, "That no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea."

The plaintiff may reply his bankruptcy, &c.

By sect. 9, it is enacted, "That to any plea in abatement, in any court of law, of the non-joinder of another person, the plaintiff may reply, that such person has been discharged by bankruptcy and certificate, or under an act for relief of insolvent debtors."

Sect. 10 regulates the subsequent proceedings, and gives costs.

By sect. 10, it is enacted, "That in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiffs shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person, provided that any such person who shall have so pleaded an abatement shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement."

DOBBIN *v.* WILSON, H. T. 1834. K. B. 3 *N. & M.* 260.

The affidavit must shew the party to be a co-contractor down to the time laid in the declaration.

AN affidavit in support of a plea in abatement, for non-joinder of a contractor, merely alleged that they were partners at the period during which the cause of action stated in the special counts accrued.

The Court held it insufficient, as it ought to have shewn that they continued such down to the time laid in the common counts.

See Newton v. *Verbeke*, 1 *Y. & J.* 362.

DE MAUTORT *v.* SAUNDERS, T. T. 1830. K. B. 1 *B. & Ad.* 398, *overruling* DUBOIS *v.* LUDERT, 5 *Taunt.* 609.

On a plea of non-joinder,

IN an action upon a bill drawn upon and accepted by the defendants, in the name of S. & Co., and on a plea in abatement of the

deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

non-joinder of two other partners, who resided abroad where the bill was drawn—

the question is, with whom the contract was made.

The Court held, that the jury were properly directed to say whether the plaintiff, when he took the bill, had any reason to know that the latter were partners in the house in which it was drawn, and if not, to find for the plaintiff. Upon such a plea the only question is, with whom the contract was made. If a party contract with two, he may sue them only; if, after the contract is made, he discovers that they had a secret partner, who had an interest in the contract, he is at liberty to sue the latter jointly with them, but he is not bound so to do.

EWER *v.* AMBROSE, H. T. 1825. K. B. 3 *B. & C.* 746; S. C. 5 *D. & R.* 629.

An answer in Chancery of the party not joined is not evidence to establish the fact of partnership.

UPON a plea in abatement for the non-joinder of a third party, and issue thereon, the defendant called that party as a witness to support the plea, who denied ever having been a partner, but admitted that, by articles prepared, but not executed, he was to have been one, and that he had drawn cheques and received large sums on account of the firm, but that the profits were received by the others only. The defendants then proposed to read his answer to a bill filed against them for a dissolution of the partnership, and offered witnesses to prove facts alleging a partnership, which, being objected to as contradicting defendant's own witness—

The Court, upon the points being reserved, held that such answer was not admissible to prove generally that the witness was not worthy of credit, nor to prove substantively the partnership, although, perhaps, it might be admissible, if its only effect were to shew that, as to a particular fact, sworn by the witness at the trial, he was mistaken.

HILL *v.* WHITE, M. T. 1839. C. P. 8 *D. P. C.* 13; S. C. 6 *Bing. N. S.* 23, 26.

If no part be against the defendants as charged, they will be entitled to judgment.

IN an action for work, &c., against A., B., and C., plea, that the promises were made jointly with D.; and by the particulars and evidence, it appeared that no part was against the three defendants, but part for some only, and the rest for the four.

The Court held, that part of the demand being against the defendants only together, the plea was an answer to the action, and the defendants entitled to the verdict.

Non obstante veredicto, Judgment of.

See particular titles, according to subject-matter.

PLUMMER *v.* LEE, T. T. 1837. Ex. 5 *D. P. C.* 755; S. C. 2 *M. & W.* 495.

If an immaterial issue be found for the

IN debt on award, the plea, not confessing the action, raised an immaterial issue, which the jury found for the defendant.

The Court held, that the proper course was to award a re-pleader,

defendant, a repleader may be awarded instead of judgment non obstante veredicto*.

and not give judgment non obstante veredicto. So, where there are several pleas and issues taken, but the action is confessed in none, if one be immaterial the Court may award a re-pleader.

GOODBURNE *v.* BOWMAN, M. T. 1832. C. P. 9 *Bing.* 667; S. C. 3 *M. & Scott*, 65.

On judgment non obstante veredicto, neither party entitled to costs.

ON motion for judgment non obstante veredicto—

The Court held, when immaterial issues are found for the defendant, but judgment afterwards entered for the plaintiff non obstante veredicto, neither was entitled to the costs of those issues.

Non Pros., Judgment of.

I. FOR WANT OF DECLARING, OR ENTERING THE ISSUE, p. 26.

II. FOR WANT OF REJOINDER, p. 26.

III. FOR WANT OF DELIVERY OF PARTICULARS OF DEMAND, p. 27.

IV. IN CASE OF PAYMENT OF MONEY INTO COURT, p. 27.

V. IN CASE OF BANKRUPTCY, p. 28.

VI. WHEN TO BE SIGNED, p. 28.

VII. COSTS ON, p. 28.

VIII. OF THE JUDGMENT, p. 29.

IX. SETTING ASIDE, p. 29.

I. FOR WANT OF DECLARING, OR ENTERING THE ISSUE†.

II. FOR WANT OF REJOINDER‡.

* Where judgment was given by the Court for the plaintiff in trespass, non obstante veredicto:—Held, that he might have his writ of inquiry without applying to the Court. (*Shephard* v. *Halls*, H. T. 1834, B. C., 2 D. P. C. 453).

† Only one demand of declaration is necessary; and therefore, if the plaintiff obtains further time to declare, the defendant will be entitled to sign a non pros. at the expiration of the last order for time. (*Teulon* v. *Gant*, T. T. 1836, B. C., 5 D. P. C. 153). A non pros. for not entering the issue pursuant to rule is irregular after notice of trial. (*Howell* v. *Jacobs*, H. T. 1836, B. C., 5 D. P. C. 394).

‡ Although a defendant is under terms to rejoin gratis, and take short notice of trial, the plaintiff cannot sign judgment of non pros. for want of a rejoinder, unless a demand for that purpose has been made. (*Seaton* v. *Skey*, E. T. 1835, B. C., 3 D. P. C. 537).

III. FOR WANT OF DELIVERY OF PARTICULARS OF DEMAND.

SUTTON *v.* CLARK, E. T. 1832. C. P. 8 *Bing.* 165; S. C. 1 *M. & Scott*, 271.

ON motion to set aside judgment of non pros.—

The omission to deliver a particular is no ground.

The Court held, that the omission to deliver particulars under a Judge's order is not a ground for signing judgment of non pros.; the penalty is only a stay of proceedings.

BURGESS *v.* SWAYNE, M. T. 1827. K. B. 7 *B. & C.* 485.

AN order obtained by a defendant for particulars of the plaintiff's demand, and for a stay of proceedings until their delivery—

The defendant should abandon the order for particulars.

The Court held it was binding on the defendant, as well as on the plaintiff, so far as regards a stay of proceedings. If the defendant wish to press on the cause, he must either give notice that he abandons the order for particulars, or apply for an order that they be delivered within a limited time, and that, in default of their delivery, the defendant may be at liberty to non pros. the action.

IV. IN CASE OF PAYMENT OF MONEY INTO COURT.

EMMETT *v.* STANDEN, E. T. 1837. Ex. 6 *D. P. C.* 591; S. C. 3 *M. & W.* 497.

IN debt for 75*l.*, on five counts for 15*l.* each, and giving credit for 10*l.* concluded for a balance of 65*l.*, the particulars giving credit also for 10*l.*, and stating a balance of 12*l.* 11*s.* 6*d.* as due, to which the defendant pleaded, first, nunq. indeb., except as to 10*l.* 13*s.*, parcel, &c.; secondly, as to 10*l.*, other parcel, payment before action brought; and thirdly, payment of that sum into Court in discharge of the cause of action in the declaration mentioned. Replication, that plaintiff accepted the said sum of 10*l.* 13*s.* in satisfaction of the causes of action, and taxed his costs.

Where plaintiff replies that he is satisfied on payment of money into Court; defendant is entitled to judgment of non pros. on the other pleas.

The Court held, that the defendant was entitled to sign judgment of non pros. as to other pleas.

COATES *v.* STEVENS, E. T. 1835. Ex. 2 *C., M. & R.* 118; S. C. 3 *D. P. C.* 784.

IN assumpsit for 30*l.*, the defendant pleaded, first, payment of 27*l.* into Court, and nothing further due; 2ndly, non assumpsit, ex-

Semble contra*.

* To a declaration for goods sold and delivered, the defendant pleaded, 1st, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.*, part of the last-mentioned sum, payment before action brought; as to 18*l.*, further parcel of the said sum, payment into Court of that amount; as to the residue, a set-off. The plaintiff replied, accepting the 18*l.* in satisfaction &c., taking no notice of the other pleas. The Court gave leave to the defendant to sign judgment of non pros., unless the plaintiff amended his replication, on payment of costs, or consented to taxation of costs as upon a nol. pros., in respect of the unanswered pleas. (*Topham* v. *Kidmore*, T. T. 1837, B. C., 5 D. P. C. 676).

cept as to 27*l.*; 3rdly, payment of 10*l.* before action; and lastly, as to all except 27*l.*, a set-off The plaintiff replied, that he accepted the sum paid in discharge, and was satisfied.

Held, that the defendant could not sign judgment of non pros. as to other pleas.

V. IN CASE OF BANKRUPTCY.

BAKER *v.* MORREY, M. T. 1827. C. P. 1 *M. & P.* 138.

Where bankruptcy is pleaded puis dar. cont., and the plaintiff discontinue, judgment of non pros. cannot be signed.

THE defendant, an uncertificated bankrupt, being arrested, justified bail, and pleaded the general issue, and the cause was set down for trial; but having subsequently obtained his certificate, he pleaded it puis darrein continuance, whereupon the record was withdrawn, and the action discontinued; and the defendant, having ruled the plaintiff to reply, signed judgment of non pros. against him for want of replication.

The Court set aside the judgment without costs.

VI. WHEN TO BE SIGNED*.

VII. COSTS ON.

MICKLAM *v.* BATE, M. T. 1828. K. B. 8 *B. & C.* 642.

After demurrer to a plea in abatement, the defendant is not entitled to costs of the judgment of non pros.

BY 4 Jac. 1, c. 3, it is enacted, "That if any person shall commence any action in any court wherein the plaintiff or defendant might have costs, in case judgment shall be given for him, and the plaintiff after appearance be nonsuited, or a verdict pass against him, then the defendant shall have his costs." Upon demurrer to a plea, the plaintiff omitted to enter the issue upon record. Judgment of non pros. was signed by the defendant for not entering the issue. The defendant's attorney applied for costs of judgment of non pros., which the plaintiff refused to pay.

Per Cur.—As the plaintiff would not have been liable to pay if the Court, after argument against him, had given judgment against him, we think he ought not to be subject to costs by reason of his having omitted to enter the issue, and thereby rendered expense unnecessary.

* Judgment of non pros. for not declaring cannot be signed before the end of the term next after an appearance is entered. (*Foster* v. *Pryme*, E. T. 1841, Ex., 9 D. P. C. 749). So, in an action against several defendants, a judgment of non pros. cannot be signed until all have appeared. (*Palmer* v. *Feistel*, E. T. 1834, B. C., 2 D. P. C. 507). The defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct it, but, instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of non pros. The Court held, that the irregular appearance might have been corrected in the book, and set aside the judgment of non pros.; the costs to be costs in the cause. (*Bate* v. *Bolton*, T. T. 1835, Ex., 2 C., M. & R. 365; S. C. 4 D. P. C. 160; S. C. 1 T. & G. 148).

VIII. OF THE JUDGMENT.

DORDSY *v.* COOK, E. T. 1825. K. B. 4 *B. & C.* 135.

The judgment can only be for the part not answered.

DEFENDANT, having omitted by mistake to plead the general issue to one count, after replication, had amended; and plaintiff not having replied to the amended plea, though ruled to do so, defendant had signed judgment of non pros. to the whole.

The Court held it irregular; it could only be signed as to that part of the suit not prosecuted.

IX. SETTING ASIDE.

ARIEL *v.* BARROW, T. T. 1832. C. P. 8 *Bing.* 375; S. C. 1 *M. & Scott*, 581.

Judgment will only be set aside if a fraud has been practised on payment of costs*.

THE attorney, in order to prevent judgment of non pros. being signed, obtained a rule to discontinue on payment of costs, and gave notice of an appointment to tax costs; but, upon the rule expiring, served a declaration.

The Court, considering it a fraud upon the Court, refused to set aside a judgment of non pros., which had been signed, except upon payment of all costs incurred.

Nonsuit, Judgment of.

I. WHERE A NONSUIT WILL OR WILL NOT BE ALLOWED, p. 30.

II. RELATIVE TO THE PARTY ENTITLED TO DEMAND IT, p. 30.

III. APPLICATION FOR, AND OF LEAVE RESERVED TO MOVE FOR, p. 31.

IV. OF THE COSTS, p. 31.

V. OF SETTING ASIDE, p. 31.

VI. NEW TRIAL AFTER, p. 31.

* The affidavit to set aside judgment of non pros. must state either a present cause of action, or that there is a good cause of action on the merits. (*Cortessos* v. *Hume*, T. T. 1833, Ex., 2 D. P. C. 134). If money be paid after judgment signed, it cannot be considered as a voluntary payment. (*Garratt* v. *Hooper*, H. T. 1831, B. C., 1 D. P. C. 28).

I. WHERE A NONSUIT WILL OR WILL NOT BE ALLOWED.

ANDERSON *v.* SHAW, M. T. 1825. C. P. 3 *Bing.* 290; S. C. 2 *C. & P.* 85.

The non-appearance of the plaintiff entitles defendant to a nonsuit*.

THE defendant pleaded a tender, and paid money into Court, which the plaintiff took out, and the defendant took down the record by proviso, and the plaintiff did not appear.

The Court held, that the defendant was not entitled to a verdict, but the plaintiff must be nonsuited.

SHEPHERD *v.* BISHOP OF CHESTER, H. T. 1830. C. P. 4 *M. & P.* 130; S. C. 6 *Bing.* 437.

A nonsuit may be entered though some issues are found for the defendant, if so reserved.

A VERDICT had been entered for the defendant on two issues, and for the plaintiff on two others, but which, it was admitted, could not be supported, if the Court should be of opinion that a variance was fatal; and the Judge reserved liberty to enter a nonsuit accordingly.

The Court held, that the Court might direct a nonsuit to be entered, notwithstanding the issues found for the defendant.

II. RELATIVE TO THE PARTY ENTITLED TO DEMAND IT.

REVELL *v.* BROWNE, T. T. 1828. C. P. 2 *M. & P.* 18.

There cannot be a verdict as to one defendant, and nonsuit as to another.

THE plaintiff, by deed, assigned all his property in trust for the payment of his debts. The defendants, as the agents or servants, and by the command of the trustees, forcibly entered and took possession of a chapel (part of the estate) in which the plaintiff was occasionally in the habit of preaching, and the key of which he held at the time, not, however, as a symbol of possession, but merely to enable him to preach there. In trespass for the breaking and entering—

The Court held, in an action against several joint defendants, if one of them have a verdict, the plaintiff cannot be nonsuited as to the others.

MURPHY *v.* DONLAN, H. T. 1826. K. B. 5 *B. & C.* 178.

But, one of several defendants suffering judgment by default does not preclude a nonsuit.

ONE of the defendants pleaded the general issue; the other suffered judgment by default. On the trial, the plaintiff's counsel, finding that he could not establish his case, claimed a right to be nonsuited. This was opposed by the defendant's counsel, on the ground that one of the defendants, having suffered judgment by default, there must now be a verdict one way or the other as to the defendant who had pleaded. The plaintiff, however, was allowed to be nonsuited; and, on a motion by the defendant to set aside the nonsuit, and enter a verdict in his favour—

* A sheriff, or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 Will. 4, c. 42, s. 17, has the same power to nonsuit as a Judge at Nisi Prius. (*Watson* v. *Abbott*, 4 Tyr. 64). Submitting to a nonsuit in deference to the opinion of the Judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. (*Alexander* v. *Barker*, M. T. 1831, Ex., 2 C. & J. 133; S. C. 2 Tyr. 140). A plaintiff cannot be nonsuited but by his own consent. (*Dewar* v. *Purday*, 4 Nev. & M. 633; 3 Ad. & E. 166).

The Court said, that notwithstanding former authorities, and the practice which had followed them, it was clear, that, in principle, there could be no distinction between the present and the ordinary case, in which a plaintiff might elect to be nonsuited.

III. APPLICATION FOR, AND OF LEAVE RESERVED TO MOVE FOR*.

IV. OF THE COSTS†.

V. OF SETTING ASIDE.

SIMPSON *v.* CLAYTON, T. T. 1835. C. P. 2 *Bing. N. S.* 467; 2 *Scott*, 291.

AFTER the judge had commenced summing up, the plaintiff proposed to be nonsuited.

No ground for setting aside nonsuit that plaintiff applied for it after Judge began summing up‡.

The Court held, that the new expression of the Judge's opinion, from time to time, upon the evidence, was no sufficient ground for setting aside the nonsuit.

VI. NEW TRIAL AFTER.

DEWAR *v.* PURDY, E. T. 1835. K. B. 4 *N. & M.* 633; S. C. 3 *Ad. & E.* 166.

UPON the closing of the plaintiff's case, the defendant applied for a nonsuit. The learned Judge refused to stop the cause, but gave leave to move for it; and, the trial having proceeded, the jury not agreeing as to their verdict, he directed, in the absence of the plaintiff's counsel, the plaintiff to be nonsuited.

If plaintiff nonsuited without consent, a new trial will be granted.

The Court held, that the plaintiff's consent to the future decision of the Court, as to the nonsuit, must be taken to have been given on condition that there should be a verdict returned; which not having been done, he was in the same situation as if he had given no consent, and that without it he could not be nonsuited and a new trial granted.

* If the counsel for a defendant has addressed the jury and examined witnesses, he has no right then to address the Judge for a nonsuit. (*Roberts* v. *Croft*, H. T., 1836, N. P., 7 C. & P. 376). So, the Court will not entertain an application for a nonsuit upon an objection taken at the trial, but not reserved by the Judge. *Mathews* v. *Smith*, T. T. 1828, Ex., 2 Y. & J. 426). And a party can only move to enter a nonsuit where leave has been given by the Judge at the trial. (*Ricketts* v. *Burman*, H. T. 1836, B. C., 4 D. P. C. 578).

† Where the plaintiff had been nonsuited at the trial, and a rule nisi obtained to set it aside:—Held, that, by the death of the defendant after the rule obtained, the suit abated, the 17 Car. 2, c. 8, not applying to cases of nonsuit. (*Farraine* v. *Hill*, E. T. 1830, C. P., 4 M. & P. 413).

‡ Where a plaintiff, of his own accord, elects to be nonsuited, he cannot afterwards move to set aside that nonsuit. (*Barnes* v. *Whiteman*, M. T. 1840, B. C., 9 D. P. C. 181). So, where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in Court, the Court refused to set aside the nonsuit, except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. (*White* v. *Sandell*, E. T. 1835, Ex., 3 D. P. C. 798).

Nonsuit, Judgment as in case of.

I. RELATIVE TO, WHEN IT WILL OR WILL NOT BE ALLOWED.

(*a*) In general, p. 33.

(*b*) Of the new rules, p. 33.

(*c*) The cause must be at issue, and of the entry of the issue, p. 34.

(*d*) Where several defendants, p. 35.

(*e*) Where a demurrer, p. 35.

(*f*) Where a new trial, rule for abandoned, p. 35.

(*g*) Where a reference, p. 35.

(*h*) Where a cause made a remanet, p. 36.

(*i*) Where debt and costs paid, before motion for, p. 36.

(*j*) In ejectment, p. 36.

(*k*) On writ of right, p. 36.

(*l*) Where cause tried before the sheriff, p. 36.

II. RELATIVE TO, WHEN TO BE MOVED FOR.

(*a*) In town causes.

1. *In general,* p. 37.
2. *Before notice of Trial,* p. 37.
3. *After notice of Trial,* p. 38.
4. *In Ejectment,* p. 39.

(*b*) In county causes, p. 39.

(*c*) Before the sheriff, p. 40.

III. RELATIVE TO THE MOTION AND RULE FOR, AND HEREIN OF PLAINTIFF'S EXCUSE FOR NOT PROCEEDING.

(*a*) Of the motion and rule, p. 40.

(*b*) Excuse for not proceeding.

1. *Illness of the Judge,* p. 41.
2. *Illness of the Witness,* p. 41.
3. *Poverty,* p. 41.
4. *Insolvency,* p. 42.
5. *Special Jury, Rule for,* p. 42.
6. *Cause not at Issue, or Action brought without plaintiff's Consent, or where Debt and Costs previously paid,* p. 43.

(*c*) Term's notice, p. 43.

IV. RELATIVE TO THE AFFIDAVIT, p. 43.

V. RELATIVE TO DISCHARGING THE RULE FOR, AND OF THE UNDERTAKING TO TRY, p. 43.

VI. RELATIVE TO MAKING THE RULE ABSOLUTE, p. 45.

VII. RELATIVE TO THE EFFECT OF THE RULE, p. 45.

VIII. RELATIVE TO THE COSTS, p. 45.

IX. RELATIVE TO SETTING ASIDE, p. 47.

I. RELATIVE TO, WHEN IT WILL OR WILL NOT BE ALLOWED.

(*a*) In general.

MONCK *v.* BONHAM, H. T. 1834. Ex. 2 *C. & M.* 430; S. C. 2 *D. P. C.* 336.

Judgment will not be granted where a good reason assigned for not trying the cause*.

ON motion for judgment as in case of a nonsuit, where a sufficient reason is given why the plaintiff should not be forced on to trial, as that the money has been paid and the action abandoned, the Court will not give judgment as in case of nonsuit, but leave the defendant to take the cause down by proviso.

(*b*) Of the new rules.

EVANS *v.* BERNARD, H. T. 1838. Ex. 6 *D. P. C.* 367; S. C. 3 *M. & W.* 276.

The new Rules make no difference.

ON motion for judgment as in case of nonsuit—

The Court held, that the new Rules make no difference as to moving for judgment as in case of nonsuit.

* But may be obtained though issue was joined seven years preceding; (*Cromer* v. *Brown*, 1834, B. C., 4 D. P. C. 288); or eight years. (*Curtis* v. *Talram*, 1824, 4 D. P. C. 600).

If a plaintiff does not proceed to trial pursuant to notice at the defendant's request, he is not entitled to judgment as in case of nonsuit. (*Doe* d. *Steppins* v. *Lord*, M. T., 1833, B. C., 2 D. P. C. 419). So, judgment refused after an agreement to pay by instalments, although one still due. (*Anon.*, E. T. 1830, Ex., 1 Tyrw. 378; S. P. *Watkins* v. *Giles*, T. T., 1835, B. C., 4 D. P. C. 14). And where the plaintiff has been nonsuited, and the nonsuit afterwards set aside, the defendant cannot move for judgment as in case &c., but must take down the cause by proviso. (*Ashley* v. *Flaxman*, T. T. 1834, Ex., 2 D. P. C. 697). So, where cause once tried and new trial granted. (——, 5 D. P. C. 393).

(*c*) THE CAUSE MUST BE AT ISSUE, AND OF THE ENTRY OF THE ISSUE.

BROOK *v.* LLOYD, E. T. 1836. Ex. 1 *M. & W.* 552; S. C. 1 *T. & G.* 924.

Cannot be obtained until similiter added*;

ON motion for judgment as in case of a nonsuit, it appeared that the plaintiff's pleadings concluded to the country.

The Court held, although he may now add the similiter without rule to rejoin, he is not bound to do so; but if he does not, the defendant is not entitled to judgment as in case of nonsuit.

RICHARDS *v.* MIDDLETON, H. T. 1840. C. P. 1 *M. & G.* 53.

in fact, the cause must be completely at issue.

THE plaintiff had withdrawn the record and amended the replication, to which the defendant had rejoined, but no surrejoinder had been delivered.

The Court held, that, the cause not having been at issue, there could be no judgment as in case of nonsuit.

WILLIAMS *v.* EDWARDS, M. T. 1834. Ex. 1 *C., M. & R.* 583; S. C. 3 *D. P. C.* 183; S. C. 5 *Tyrw.* 177.

The issue need not be entered†.

ON motion for judgment as in case of nonsuit—

The Court said, it was no longer necessary to enter the issue.

COALTSWORTH *v.* MARTIN, M. T. 1831. Ex. 2 *C. & J.* 123; S. C. 2 *Tyrw.* 169.

And, before Reg. Gen. H. T. 4 Will. 4, in the Exchequer, defendant might move without rule to enter the issue‡.

ON a rule to shew cause for judgment as in case of a nonsuit, it was contended, that the motion was premature, because the plaintiff had not been ruled to enter the issue.

Bayley, B.—In this Court there is no rule to enter the issue, but before the defendant can move for judgment as in case of a nonsuit, he must give four days' notice of the motion.

* If the similiter be omitted in any one of the issues, though added in the others, the defendant cannot move for judgment as in case of a nonsuit; (*Wright* v. *Oldfield*, 1840, B. C., 8 D. P. C. 899); because no issue is joined until similiter added. (*Gilmore* v. *Melton*, E. T. 1834, Ex., 2 D. P. C. 632). So, for want of a rejoinder. (*Brown* v. *Kennedy*, E. T. 1834, Ex., Id. 639; S. P. *Seabrook* v. *Cave*, T. T. 1834, Ex., Id. 691). A similiter intitled in a wrong Court is a nullity; and therefore, in such case, there can be no issue joined to warrant a motion for judgment as in case of a nonsuit. (*Ray* v. *Good*, M. T. 1836, Ex., 5 D. P. C. 295). But it is not necessary that the issue should be made up and delivered, in order to entitle the defendant to move for judgment as in case of nonsuit. Where the defendant had refused to accept the notice of trial:—Held, that he could not resort to it in support of his motion for judgment as in case of nonsuit, although the plaintiff afterwards refused to proceed with a reference, agreed to between the parties. (*Clarke* v. *Goldsmid*, H. T. 1839, C. P., 5 Bing. N. S. 120).

† The defendant, unnecessarily ruling the plaintiff to enter the issue, does not preclude him from moving for judgment as in case of nonsuit. (*Sarjeant* v. *Jones*, M. T. 1833, B. C., 2 D. P. C. 420).

‡ The Reg. Gen. 70, H. T. 2 Will. 4, directs, that no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.

(*d*) WHERE SEVERAL DEFENDANTS.

STEWART *v.* ROGERS, H. T. 1839. Ex. 7 *D. P. C.* 185; S. C. 4 *M. & W.* 640.

May be moved though one of several defendants suffer judgment by default.

ON motion for judgment as in case of a nonsuit, the action having been brought against two defendants, and one of them having let judgment go by default—

Parke, B.—The 14 Geo. 2, c. 17, which authorizes the application to the Court for judgment as in case of a nonsuit, provides that all judgments given by virtue of that act shall be of like force and effect as judgments upon nonsuit. As a regular nonsuit might have taken place if the plaintiff had proceeded to trial, I think the defendant is entitled to his rule.

JONES *v.* GIBSON, T. T. 1826. K. B. 5 *B. & C.* 768; S. C. 8 *D. & R.* 592.

So, if defendants plead separately, one may obtain the rule*.

ON motion for judgment as in case of a nonsuit, it appeared that the defendants pleaded the general issue by separate attornies. Issue was joined in Michaelmas Term last, and notice of trial given for the sittings after Hilary Term. The objection to the rule was, that one of two defendants cannot move for judgment as in case of a nonsuit.

The Court granted the rule.

(*e*) WHERE A DEMURRER.

GORDON *v.* SMITH, H. T. 1843. C. P. 6 *Bing. N. S.* 273; S. C. 8 *Scott*, 560.

Pending a demurrer plaintiff is not bound to try the issue.

ISSUE had been joined on fact, and there was a plea and demurrer; but the plaintiff not having demanded a joinder in demurrer, an order was obtained for striking out the plea and demurrer—

The Court refused the rule for judgment as in case of nonsuit, the plaintiff not being bound to go to trial so long as the demurrer was pending.

(*f*) WHERE A NEW TRIAL, RULE FOR ABANDONED†.

(*g*) WHERE A REFERENCE.

HANSBY *v.* EVANS, H. T. 1839. Ex. 7 *D. P. C.* 198; S. C. 4 *M. & W.* 565.—S. P. CLARKE *v.* GOLDSMID, H. T. 1839. C. P. 5 *Bing. N. S.* 120.

Cannot be removed after re-

THE cause was referred; at the trial—

The Court held, that the defendant could not move for judgment

* But where issue had only been joined in time as to one defendant, to enable him to move, but not duly as to other defendants, the rule was refused. (*Crowther* v. *Duke*, E. T. 1839, C. P., 7 D. P. C. 409; S. C. 7 Scott, 344).

† If plaintiff has once taken his cause down to trial, although a new trial may be granted, and he has given fresh notice, pursuant to which he does not proceed, the defendant is not entitled to judgment as in case of a nonsuit. (*Hawley* v. *Sherly*, H. T. 1836, B. C., 5 D. P. C. 393).

cord withdrawn, and a reference.

as in case of nonsuit, although the plaintiff afterwards refused to proceed with the reference.

(*h*) WHERE CAUSE MADE A REMANET*.

(*i*) WHERE DEBT AND COSTS PAID BEFORE MOTION FOR†.

(*j*) IN EJECTMENT‡.

(*k*) ON WRIT OF RIGHT.

DENMAN *dem.*, BULL *ten.*, E. T. 1826. C. P. 3 *Bing.* 499.

On a writ of right judgment as in case of nonsuit may be obtained.

THE demandant in a writ of right took down the cause, which was made a remanet to the next assizes, at which the tenant appeared; but the demandant did not try.

The Court held, that the tenant was not entitled to judgment as in case of nonsuit, not having carried down the record by proviso.

(*l*) WHERE CAUSE TRIED BEFORE THE SHERIFF.

WRIGHT *v.* SKINNER, M. T. 1834. Ex. 1 *T. & G.* 69.

The motion cannot be made where an irregular order has been made by a Judge to try before the sheriff §.

ISSUE having been joined on 22nd July, the defendant took out a summons calling on plaintiff to try before a sheriff in a fortnight, and a Judge granted an order accordingly. The plaintiff took out a summons to rescind that order; and another order was obtained to try at the next court day.

Held, first, that the Judge had no power to make such an order; secondly, that a motion for judgment as in case of a nonsuit in

* When the cause has been once taken down and made a remanet, the defendant cannot afterwards have judgment as in case of nonsuit, although the plaintiff may have again given notice of trial and not proceeded. (*Gilbert* v. *Kirkland*, E. T. 1833, B. C., 2 D. P. C. 153).

† It is a sufficient answer to a rule for judgment as in case of a nonsuit, that the debt and costs have been paid after issue joined, and before the rule was obtained, although the payment has been made without the knowledge of the defendant's attorney. (*Elias* v. *Elias*, M. T. 1840, B. C., 9 D. P. C. 104).

‡ The 14 Geo. 2, c. 17, as to judgment in case of a nonsuit, applies to actions of ejectment as well as to other actions. (*Doe* d. *Berger* v. *Docker*, E. T. 1838, B. C., 6 D. P. C. 478). In ejectment for forfeiture for breaches, as to some of which money was paid into Court and taken out by the plaintiff, and he did not go to trial with the others:—Held, that the defendant was entitled to judgment as in case of nonsuit. (*Doe* d. *Stanley* v. *Towgood*, M. T. 1833, B. C., 2 D. P. C. 404). Where the defendant came in as landlord:—Held, that it was no answer to an application for judgment as in case of nonsuit, that the tenants had given up possession, as they could not deprive him of his right to have the title tried. (*Doe* d. *Draper* v. *Dyer*, E. T. 1835, Ex., 2 C., M. & R. 60; S. C. 3 D. P. C. 696).

§ Semble, that judgment as in case of a nonsuit cannot be moved against a plaintiff who has once taken his cause down to trial, though it took place before the sheriff, under the Writ of Trial Act, and that the proper course is to get a Judge's order for trying the cause by proviso. (*Day* v. *Day*, H. T. 1836, Ex., 4 D. P. C. 740; S. C. 1 M. & W. 39). The defendant is equally entitled to move where the issue is to be tried before the sheriff, as at the sittings, but not in the same term in which the default takes place. (*Begbie* v. *Grenville*, M. T. 1833, Ex., 2 D. P. C. 238). Where a plaintiff obtains an order under the

Michaelmas Term, was premature; and, lastly, that that motion having been made on the faith of a Judge's order, which was overturned by the decision of the Court, the rule for judgment as in case of a nonsuit should be discharged without costs.

II. RELATIVE TO, WHEN TO BE MOVED FOR*.

(*a*) In town causes.

1. *In general.*

Isaacs *v.* Goodman, E. T. 1833. Ex. 1 *C. & M.* 494.

A plaintiff is only bound to take one step in a term.

The plaintiff not being bound to take more than one step in a term—

The Court held, that issue being joined, and notice of trial for the sittings countermanded, judgment as in case of nonsuit could not be moved in the same term.

2. *Before Notice of Trial.*

Reg. Gen. M. T. 1824. Ex. 1 *M'Clell.* 708.

Cannot be moved in next term, unless notice of trial has been given.

It is ordered, That no rule for judgment as in case of a nonsuit be granted in the next term after issue joined, unless it appear on the affidavit on which the motion is founded, that the plaintiff had given notice of trial, and had neglected to proceed to trial pursuant to such notice.

Simons *v.* Folkenham, T. T. 1831. Ex. 1 *C. & J.* 513; S. C. 1 *Tyrw.* 501.—S. P. Heale *v.* Curtis, M. T. 1836. Ex. 5 *D. P. C.* 294; S. C. 2 *M. & W.* 76.—S. P. Gough *v.* White, M. T. 1837. Ex. 2 *M. & W.* 363.—S. P. Anon., T. T. 1833. Ex. 2 *D. P. C.* 122.—S. P. Appleby *v.* Morse, E. T. 1838. B. C. 6 *D. P. C.* 505.—S. P. Pearson *v.* Chessun, E. T. 1838. B. C. 6 *D. P. C.* 507.—S. P. Wyatt *v.* Howell, E. T. 1837. Ex. 5 *D. P. C.* 585; Thomas *v.* Jones, T. T. 1839. B. C. 7 *D. P. C.* 712.

It cannot be moved until two terms after issue joined†.

On motion for judgment as in case of a nonsuit—

The Court said, the rule is, that judgment as in case of nonsuit, in a town cause, where no notice of trial has been given, cannot be

3 & 4 Will. 4, c. 42, s. 17, for the trial of an issue before the sheriff, the Court will compel him to proceed within a reasonable time. (*Mullins* v. *Bishop*, T. T. 1834, B. C., 2 D. P. C. 557). And, where a plaintiff does not proceed to trial of an issue before the under-sheriff, pursuant to notice, the time at which he would be compelled to proceed by the Court will be regulated by the times at which the sheriff sits. (*Banks* v. *Wright*, M. T. 1834, B. C., 3 D. P. C. 14).

* By Reg. 68, H. T. 2 Will. 4, the rule may be obtained without previous notice of motion, but in that case it shall not operate as a stay of proceedings.

† Where issue is joined in a London cause in Trinity vacation, and no notice of trial given, it is too early to move for judgment as in case of nonsuit, in the following Hilary Term, although an order had been obtained for trying before the sheriff. (*Fox* v. *M'Culloch*, E. T. 1837, B. C., 5 D. P. C. 526). So, issue was joined in a town cause on the 6th December; a motion for judgment as in case of a nonsuit in Easter Term was held premature. (*Duggan* v. *Wilbraham*, E. T. 1840, C. P., 8 D. P. C. 582; S. C. 1 Scott, N. S. 212.—S. P. *Doe* d. *Balls* v. *Margrave*, T. T. 1840, C. P., 8 D. P. C. 213, n.—S. P. *Heale* v. *Curtis*, M. T. 1836, Ex., 5 D. P. C. 294; S. C. 2 M. & W. 76). So, where issue

moved for until the second term after that in which issue has been joined, nor in a country cause until the term after the second assizes after issue joined.

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3. After Notice of Trial.

MARSHALL *v.* FOSTER, M. T. 1833. Ex. 2 *C. & M.* 213; S. C. 2 *D. P. C.* 228; S. C. 4 *Tyrw.* 93.—S. P. PREEDY *v.* MACFARLANE, M. T. 1833. Ex. 2 *D. P. C.* 216.—S. P. GRIPPER *v.* LORD TEMPLEMORE, H. T. 1836. B. C. 5 *D. P. C.* 408.—S. P. PHILLIPS *v.* DAVIS, H. T. 1839. C. P. S. C. 5 *Bing. N. S.* 227.—S. P. BAINBRIDGE *v.* PURVIS, T. T. 1832. B. C. 1 *D. P. C.* 444.—S. P. WINGROVE *v.* HODSON, H. T. 1834. Ex. 2 *D. P. C.* 379.

Judgment cannot be moved for in same term as notice of trial.

ISSUE was joined in Trinity Term, and notice of trial given for the second sittings in Michaelmas Term, but countermanded in proper time. The defendant then moved for judgment as in case of a nonsuit, there being time in the term to give notice for the sittings after term.

The Court held it too soon.

NEY *v.* HUSBAND, M. T. 1839. Ex. 7 *D. P. C.* 867; S. C. 5 *M. & W.* 493.—S. P. RANGER *v.* BLIGH, M. T. 1836. B. C. 5 *D. P. C.* 235.

Giving notice of trial earlier than required makes no difference*;

ON motion for judgment in case of a nonsuit, it appeared that the plaintiff gave notice of trial, although earlier than the rules of the Court required.

The Court held, he was bound to proceed, or judgment as in case of nonsuit may be moved for.

See cases in note.

DOWNES *v.* CROSS, E. T. 1832. Ex. 2 *C. & J.* 466; S. C. 1 *D. P. C.* 561.

but an agreement to dispense with is not equivalent to a notice.

ON motion for a judgment as in case of a nonsuit, it appeared that, by an arrangement between the attornies, no notice of trial was given, and the plaintiff did not enter the record.

The Court held, that the agreement was not equivalent to a notice, so as to entitle the defendant to judgment as in case of nonsuit.

was joined in a town cause, on the 9th of March, in Hilary Term:—Held, that a motion for judgment as in case of a nonsuit in Trinity Term was too soon, although the lessor of the plaintiff had been ruled in Hilary Term to join issue. (*Doe* d. *Balls* v. *Margrave*, T. T. 1840, C. P., 8 D. P. C. 824).

* Giving notice that a cause will be taken as undefended at the sittings in London, and appearing for the purpose of trying the cause as undefended, is not a sufficient taking the cause down to trial to prevent the defendant from obtaining judgment as in case of a nonsuit. (*Edrupp* v. *Davies*, H. T. 1833, B. C., 1 D. P. C. 552). If notice of trial be countermanded at the request of the defendant, he cannot obtain judgment as in case of a nonsuit, on the ground of not proceeding to trial pursuant to notice. (*Jenkins* v. *Charity*, T. T. 1833, B. C., 2 D. P. C. 197). Where the defendant is entitled to judgment as in case of nonsuit, the right is not affected by plaintiff giving notice of trial before the motion. (*Smedley* v. *Christie*, E. T. 1833, B. C., 2 D. P. C. 152). The defendant may move for judgment as in case of nonsuit, where plaintiff makes default in trying pursuant to his notice, although he may have given it a term earlier than by the practice of the Court is required. (*Howell* v. *Powlett*, H. T. 1832, C. P., 8 Bing. 272; S. C. 1 M. & Scott, 355).

4. *In Ejectment.*

DOE *v.* ROE, M. T. 1831. Ex. 2 *C. & J.* 123.

ON the 24th November motion was made for judgment as in case of nonsuit, under 1 Will. 4, c. 70, s. 34. The right of entry accrued in, and the declaration was intitled of, and served in this term.

Bayley, B.—That statute applies only where the right of entry accrues in or after issuable terms.

Under 1 Will. 4, c. 70, in ejectment, only issuable terms are reckoned.

(*b*) IN COUNTRY CAUSES.

PRENTICE *v.* BLOTT, M. T. 1824. C. P. 2 *Bing.* 360.

ON motion for judgment as in case of a nonsuit, upon an affidavit that issue was joined in Trinity Term, and that no notice of trial was given, nor did the plaintiff proceed to trial at the then next assizes, although there was time sufficient to proceed to trial after issue was joined; the Secondaries, on being applied to by the Court, referred to a MS. case, C. B., Trinity Term, 1812, in which a motion made under similar circumstances was held premature; and—

The Court concurred in that decision.

A party in a country cause is not bound to proceed to trial at the next assizes after issue joined*.

CROWLEY *v.* DEAN, E. T. 1830. Ex. 1 *C. & J.* 18.—S. P. EVANS *v.* BARNARD, H. T. 1838. Ex. 6 *D. P. C.* 367; S. C. 3 *M. & W.* 276.—S. P. HEATH *v.* BOXALL, M. T. 1838. Ex. 7 *D. P. C.* 19.

ON motion for judgment &c., it appeared that issue was joined in a country cause in Michaelmas Term, and the plaintiff did not proceed to trial at the assizes after Hilary Term.

The Court held, that defendant was entitled to judgment as in case of nonsuit in the ensuing term, although no notice of trial had been given.

Where notice of trial, the defendant is entitled to move the term after the assizes.

SMITH *v.* MILLER, M. T. 1837. Ex. 6 *D. P. C.* 154; S. C. 3 *M. & W.* 60; *semble contra*, ROBINSON *v.* TAYLOR, H. T. 1837. B. C. 5 *D. P. C.* 518.

IN Michaelmas Term, on motion for judgment as in case of a nonsuit, it appeared issue was joined in Easter Term in a country cause, and that no notice of trial was given for the summer assizes.

But, where no notice of trial, judgment can-

* Where issue was joined on the 24th November in a country cause, and the plaintiff did not give notice of trial:—Held, that judgment as in case of a nonsuit might be moved for after one assize had passed. (*Smith* v. *Rigby*, E. T. 1835, Ex., 3 D. P. C. 705.—S. P. *Williams* v. *Edwards*, H. T. 1835, Ex., 1 C., M. & R. 583; S. C. 3 D. P. C. 183). So, issue joined in a country cause on the 10th January, judgment as in case of a nonsuit may be moved for in Trinity Term; (*Lister* v. *Ventom*, T. T. 1839, B. C., 7 D. P. C. 696); but where issue was joined in Michaelmas, and notice of trial given in a country cause:—Held, that, the joining of issue being referable to the subsequent term, the motion for judgment as in case of nonsuit, in Trinity Term, was premature. (*Dore* v. *Hayden*, T. T. 1840, Ex., 6 M. & W. 626). So, issue joined in Michaelmas Term, in a country cause, and notice of trial not given for the ensuing assizes, it is too early to move for judgment as in case of a nonsuit in Easter Term following. (*Harrison* v. *Williams*, T. T. 1838, K. B., 6 D. P. C. 772.—S. P. *Apperby* v. *Morse*, E. T. 1838, B. C., 6 D. P. C. 505).

not be moved for till after the second assizes.

Per Cur.—This rule has been obtained too soon according to the old practice before the new Rules. In *Gough* v. *White*, (2 M. & M. 363), it was agreed, after consideration with the other Judges, that those Rules do not alter the old practice with reference to the time when this motion was made.

WILLIAMS *v.* DAVIS, H. T. 1839. C. P. 7 *D. P. C.* 246; S. C. 7 *Scott*, 178; S. C. 5 *Bing. N. S.* 227.

However, the real difference is between issuable and non-issuable terms.

ON motion for judgment in case of a nonsuit—

Per Cur.—The rule is settled, that, in a country cause where issue is joined in a non-issuable term, the defendant may move for judgment as in case of a nonsuit for not proceeding to trial in the term after the next assizes; but that, where issue is joined in an issuable term, he cannot move until two assizes have elapsed.

(*c*) BEFORE THE SHERIFF.

BUTTERWORTH *v.* CRABTREE, M. T. 1834. Ex. 1 *C., M. & R.* 519; S. C. 3 *D. P. C.* 184; S. C. 5 *Tyrw.* 149.

Lapse of two sheriff's courts not sufficient*.

AFTER a Judge's order for trial before the sheriff of a country cause, the plaintiff omitted to give notice of trial until after the lapse of two sheriff's courts.

The Court held, that the defendant was not entitled to move for judgment as in case of nonsuit.

III. RELATIVE TO THE MOTION AND RULE FOR, AND HEREIN OF PLAINTIFF'S EXCUSE FOR NOT PROCEEDING.

(*a*) OF THE MOTION AND RULE†.

* Notice of trial before the sheriff being given for a day in term, the plaintiff cannot move for judgment for not proceeding to trial in that term. So, semble, in town causes; but costs of the day incurred may be moved for by distinct motion in such term. (*Lenney* v. *Poluden*, E. T. 1835, Ex., 3 D. P. C. 650; 5 Tyrw. 819). So, issue joined in a town cause in Hilary vacation on the 2nd of February, and an order obtained on the 3rd to try before the sheriff:—Held, that it was too early to apply for judgment as in case of a nonsuit in the following Easter Term, although several sheriff's court days had passed since the order was obtained. (*Stacey* v. *Jeffrys*, E. T. 1837, B. C., 5 D. P. C. 524). So, where issue was joined on the 20th of June, and notice given for trial at the sheriff's court on the 18th July, which the plaintiff countermanded:—Held, that a motion in the term next following, for judgment as in case of a nonsuit, was too early. (*Maddeley* v. *Batty*, M. T. 1834, Ex., 3 D. P. C. 205). But, a defendant may obtain judgment as in case of a nonsuit, where notice of trial has been given before the sheriff, pursuant to 3 & 4 Will. 4, c. 42, s. 17. (*Walls* v. *Redmayne*, E. T. 1834, B. C., 2 D. P. C. 508.—S. P. *Horwood* v. *Roberts*, 2 D. P. C. 534).

The issue in a country cause, ordered to be tried before the sheriff, was joined on the 9th of August, but the plaintiff did not give notice of trial; a motion for judgment as in case of a nonsuit, in the Hilary Term following, was held to be premature. (*Harle* v. *Wilson*, E. T. 1835, Ex., 3 D. P. C. 658.—S. P. *Horwood* v. *Roberts*, T. T. 1834, B. C., 2 D. P. C. 534).

† The rule for judgment after a peremptory undertaking to be absolute in the first instance. (Reg. Gen., M. T. 1839, C. P., 4 Bing N. S. 365). But a rule for

(*b*) Excuse for not proceeding.

1. *Illness of the Judge**.

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2. *Illness of the Witness.*

Ham *v.* Gregg, M. T. 1826. K. B. 6 *B. & C.* 125.

A cause at the London sittings was made a remanet, but the plaintiff, on account of the absence of a material witness on the ground of illness, did not take the record to the marshal for trial. Illness of a witness is no excuse.

The Court held, that defendant was entitled to move for judgment as in case of a nonsuit.

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3. *Poverty.*

Cleasby *v.* Poole, M. T. 1834. Ex. 1 *C., M. & R.* 521; S. C. 3 *D. P. C.* 162; S. C. 4 *Tyrw.* 146.—S. P. Fielder *v.* Crow, T. T. 1835. B. C. 4 *D. P. C.* 50.

The plaintiff being poor and unable to furnish the attorney with funds to carry on the suit— Poverty no answer,

The Court held that circumstance no answer.

Radford *v.* Smith, M. T. 1838. Ex. 7 *D. P. C.* 26; S. C. 4 *M. & W.* 100.

On a rule for judgment as in case of a nonsuit, an affidavit stated that the plaintiff had been unable to proceed to trial in consequence of being disappointed in the receipt of a remittance from the country, and that he expected to receive one so as to enable him to go to trial at any time after the 1st of July. unless temporary.

Per Cur.—It is only that the plaintiff is not in funds at present, but expects to be so within a definite period.—Rule discharged upon a peremptory undertaking.

judgment as in case of a nonsuit cannot be drawn up with a stay of proceedings. (*Archer* v. *Smith*, M. T. 1840, B. C., 9 D. P. C. 99).

Where the rule for judgment as in case of nonsuit had been discharged on a peremptory undertaking, but the rule for the latter had never been served nor drawn up until after the period to which it referred had expired:—Held, that judgment signed for non-compliance was irregular. (*Gingell* v. *Bean*, H. T. 1840, C. P., 1 Scott, N. S. 153; S. C. 1 M. & G. 50).

Where the rule is moved for after money has been paid into court under 7 & 8 Geo. 4, c. 71, there cannot be added that the money be taken out of court; it must be the subject of a separate and subsequent application. (*De Bedolliere* v. *Ryan*, E. T. 1839, B. C., 7 D. P. C. 615.—S. P. *Vale* v. *Ganter*, M. T. 1840, B. C., 9 D. P. C. 106).

* Where a plaintiff has given a peremptory undertaking to try at a particular assize, and he is prevented from fulfilling it by the sudden illness of the Judge, that is not a sufficient excuse to prevent the defendant from obtaining judgment as in case of a nonsuit absolute. (*Ward* v. *Turner*, E. T. 1836, B. C., 5 D. P. C. 22).

4. *Insolvency.*

HOLLAND *v.* HENDERSON, M. T. 1838. Ex. 4 *M. & W.* 587.—S. P. FAULKER *v.* WHITTULL, E. T. 1835. C. P. 1 *Scott*, 216.

Insolvency of defendant an answer*,

A RULE for judgment had been obtained; the defendant having become insolvent since the action commenced—

The Court ordered the rule to be discharged with costs unless a stet processus were accepted.

SMITH *v.* DAVIS, M. T. 1840. C. P. 9 *D. P. C.* 50; S. C. 2 *Scott, N. S.* 189; S. C. 1 *M. & G.* 961.—S. P. CUNNINGHAM *v.* REES, H. T. 1830. Ex. 1 *Tyrw.* 1.

unless known to plaintiff before action brought;

ON motion for judgment as in case of nonsuit, it did not appear distinctly that the defendant's insolvency became known to the plaintiff since the commencement of the action—

The Court refused the plaintiff to take a stet processus, but granted the rule for a peremptory undertaking.

MANN *v.* WILLIAMSON, M. T. 1840. Ex. 7 *M. & W.* 145; S. C. 8 *D. P. C.* 859.—S. P. FRODSHAM *v.* RUNT, T. T. 1835. B. C. 4 *D. P. C.* 90.

and discovery after filing declaration, no answer.

ON motion for judgment as in the case of nonsuit, excuse that after filing the declaration the plaintiff discovered that the defendant was in insolvent circumstances—

The Court held this not a sufficient ground for awarding a stet processus.

GINGELL *v.* BEAN, T. T. 1840. C. P. 1 *Scott, N. S.* 390; S. C. 1 *M. & G.* 555.

Defendant being in prison an answer.

THE plaintiff had become bankrupt, and the defendant, in prison, having given notice of his intention to apply for a discharge under the Insolvent Act—

The Court compelled him to accept a stet processus.

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5. *Special Jury, Rule for.*

TWYSDEN *v.* STULZ, T. T. 1838. C. P. 6 *Scott*, 434.—S. P. WEBBER *v.* ROE, E. T. 1835. B. C. 3 *D. P. C.* 589.

Obtaining a rule for a special

ON motion for judgment as in case of a nonsuit after a peremptory undertaking to try, the plaintiff obtained a rule for a special jury,

* As taking the benefit of the Insolvent Debtors' Act. (*Smith* v. *Badcock*, E. T. 1836, Ex., 5 D. P. C. 91). So, where it does not appear that the plaintiff was unawares of the insolvency when he brought the action. (*Lemon* v. *Hopson*, T. T. 1838, B. C., 6 D. P. C. 795). It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff has been informed and believes the defendant is in insolvent circumstances. (*Symes* v. *Amor*, T. T. 1840, Ex., 8 D. P. C. 773). And, where a plaintiff has not proceeded to trial pursuant to his notice, if he sets up the insolvency of the defendant as an excuse for the default, he ought to shew by his affidavit in terms that the insolvency of the defendant was really his reason for not proceeding to trial. (*Wainwright* v. *Gibson*, M. T. 1840, B. C., 9 D. P. C. 100).

thereby preventing the cause from being tried at the sittings after the last term.

jury is not a default, if a proper cause to be tried by a special jury.

Tindal, C. J.—Whether or not the making a cause a special jury is a default within the statute will depend upon whether or not it is a reasonably proper cause to be tried by a special jury.

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6. *Cause not at Issue, or Action brought without Plaintiff's Consent, or where Debt and Costs previously paid*.*

(*c*) Term's notice†.

IV. RELATIVE TO THE AFFIDAVIT‡.

V. RELATIVE TO DISCHARGING THE RULE FOR, AND OF THE UNDERTAKING TO TRY.

Levy *v.* Hutchins, H. T. 1836. C. P. 1 *Scott*, 400.

An indictment pending is a ground for discharging the rule§.

An action for false imprisonment was brought upon a charge of assault, dismissed by the magistrates; after which the defendant preferred a bill of indictment at the sessions, and which was removed into K. B., and the plaintiff then withdrew his record.

* In answer to a rule for judgment as in case of nonsuit, the plaintiff's attorney swore that he had not added the similiter, nor had it been added to his knowledge or belief:—Held, a sufficient answer. (*Martin* v. *Martin*, 2 Scott, 389; 2 Bing. N. S. 240). The Court will discharge the rule for judgment as in case of a nonsuit, though the defendant swears the cause is at issue, if the plaintiff swears that the similiter has not been added. (*Seabrook* v. *Cave*, T. T. 1834, Ex., 2 D. P. C. 691). But it is no answer to a rule for judgment as in case of a nonsuit, that the proceedings were commenced against the defendant without the plaintiff's authority. (*Barber* v. *Wilkins*, M. T. 1836, Ex., 5 D. P. C. 305). But it is a sufficient answer to a rule for judgment as in case of a nonsuit, that the debt and costs have been paid after issue joined, and before the rule was obtained, although the payment has been made without the knowledge of the defendant's attorney. (*Elias* v. *Elias*, M. T. 1840, B. C., 9 D. P. C. 104).

† The practice of not requiring a term's notice of proceeding before motion for judgment as in case of nonsuit declared to prevail in the Exchequer, assimilating the practice with that of other Courts, superseding the Rule of Trinity 26 & 27 Geo. 2. (*Hockin* v. *Reece*, E. T. 1828, Ex., 2 Y. & J. 275).

‡ An affidavit, shewing the plea and replication, and that the cause was thereby at issue:—Held insufficient. (*Smyth* v. *Parslow*, T. T. 1832, Ex., 2 C. & J. 217; S. C. 2 Tyrw. 284). But an affidavit in support of the motion, stating notice of trial given, is sufficient without alleging that the cause was at issue. (*Corbyn* v. *Heyworth*, M. T. 1837, C. P., 6 D. P. C. 181; S. C. 3 Scott, 335). In answer to a rule for judgment as in case of a nonsuit, the affidavit stated "that, since joining issue in the above-named cause, unexpected difficulties have arisen in procuring the necessary evidence to entitle the plaintiff to a verdict in his favour:" —Held a sufficient excuse. (*Doe* d. *Ringer* v. *Blois*, M. T. 1839, C. P., 8 D. P. C. 18).

A motion on behalf of the same plaintiff in two different actions, upon the same ground of application, may be made upon one affidavit intitled in both actions. (*Pitt* v. *Evans*, M. T. 1833, Ex., 2 D. P. C. 226).

§ So, if a plaintiff does not proceed to trial, pursuant to notice, at the defendant's request, the rule will be discharged. (*Doe* d. *Steppins* v. *Lord*, M. T. 1833, K. B., 2 D. P. C. 419). So, where, upon a new trial granted, the defendant took down the cause by proviso, and the plaintiff obtained an order to put off the

The Court held this a sufficient excuse, and a rule for judgment as in case of nonsuit discharged, with costs.

trial to the next assizes upon giving a peremptory undertaking to try then:—Held, that being a bargain between the parties, it was not necessary to make the order a rule of Court; and upon the plaintiff failing to try according to his undertaking, the Court granted judgment as in case of nonsuit. (*Jones* v. *Pritchard*, T. T. 1831, Ex., 2 Tyrw. 383). So, where a defendant has given a cognovit for the debt sought to be recovered in an action by the plaintiff, and the plaintiff does not proceed to trial, and the defendant obtains a rule for judgment as in case of a nonsuit, that rule will be discharged with costs. (*Smith* v. *Joy*, M. T. 1833, B. C., 2 D. P. C. 410). And where the plaintiff had accepted the debt and costs the Court discharged the rule without a peremptory undertaking. (*Shrimpton* v. *Carter*, E. T. 1835, Ex., 3 D. P. C. 648). So, where, upon the dissolution of partnership between the attornies who originally conducted the cause, one of them afterwards continued it, and a summons was attended without objection, the Court discharged a rule for setting aside a judgment as in case of nonsuit, on the ground of no order to change having been obtained. (*Farley* v. *Hebbes*, E. T. 1835, K. B., 3 D. P. C. 538). A plaintiff who has given a peremptory undertaking to try at a particular sitting, is bound to be prepared for that purpose, although the defendant is not ready to proceed. (*Saxon* v. *Swaby*, T. T. 1835, B. C., 4 D. P. C. 105). So, where a peremptory undertaking had been given to try, but the plaintiff neglected to go to trial in time, because it was found that the declaration required amendment, and a proposal to refer was going on:—Held, that that was no excuse, and that the defendant was entitled to judgment as in case of a nonsuit. (*Haines* v. *Taylor*, E. T. 1834, Ex., 2 D. P. C. 644). Upon a peremptory undertaking being accepted, the Court permitted an order for costs of the day, "if any," to be added to the rule; but refused it where it appeared that notice of trial having been countermanded, there could have been none. (*Doe* v. *Owen*, E. T. 1836, Ex., 1 M. & W. 323). And if, after a motion for the costs of the day for not proceeding to trial, the plaintiff suffers another term to elapse without giving notice of trial, that is a new default, which entitles the defendant to move in the next term for judgment as in case of a nonsuit. (*Dyke* v. *Edwards*, E. T. 1833, Ex., 2 D. P. C. 53; semble contrà, *Moseley* v. *Clark*, E. T. 1833, Ex., 2 D. P. C. 66).

Though a rule absolute for judgment as in case of a nonsuit has been obtained for not proceeding to trial, pursuant to a peremptory undertaking, yet if it appears to have been through mistake that notice of trial was not given in time, and no inconvenience has been sustained by the defendant in consequence, the Court will discharge the rule on payment of costs. (*Charrington* v. *Meatheringhan*, M. T., 1835, Ex., 4 D. P. C. 479).

In a town cause, issue was joined and notice of trial given for the sittings in Michaelmas Term. The cause was made a remanet, but the plaintiff did not proceed to trial. In Easter Term, a rule was made absolute for costs of the day for not proceeding to trial, and subsequently a rule nisi was obtained for judgment as in case of a nonsuit, which rule was discharged in Trinity Term. In the same term the defendant obtained a similar rule nisi. No fresh notice of trial had been given:—Held, that the defendant was entitled to move for judgment as in case of a nonsuit. (*Smith* v. *Pole*, M. T., 1839, Ex., 7 D. P. C. 792; S. C. 5 M. & W. 491).

In Michaelmas Term, 1837, plaintiff obtained a rule nisi for judgment as in case of a nonsuit, which was discharged upon a peremptory undertaking to try at the next assizes. After the assizes, and before the ensuing term, both parties agreed to a reference. The arbitrator omitted to make his award within the time limited:—Held, that the peremptory undertaking was put an end to by the agreement of reference. (*Spurr* v. *Rayner*, T. T. 1839, Ex., 7 D. P. C. 467; sed vide supra).

Where a plaintiff gives a peremptory undertaking to try at the next practicable sheriff's court, he is bound to take proper steps to try the cause before the defendant obtains judgment absolute as in case of a nonsuit, although for that purpose it may be necessary for him to obtain a special appointment of a court from the sheriff. (*Sell* v. *Adam*, T. T. 1839, B. C., 7 D. P. C. 672). And, where a plaintiff does not proceed to the trial of an issue before the under-sheriff pursuant to notice, the time at which he would be compelled to proceed by the Court will be regulated by the times at which the sheriff sits. (*Banks* v. *Wright*, M. T. 1834, B. C., 3 D. P. C. 14).

In all cases of peremptory undertaking to try, a fresh notice of trial should be given, though the cause remains in the paper. (*Sulsh* v. *Cranbrook*, M. T. 1831, B. C., 1 D. P. C. 148).

VI. RELATIVE TO MAKING THE RULE ABSOLUTE*.

VII. RELATIVE TO THE EFFECT OF THE RULE†.

JONES *v.* HOWS, E. T. 1837. Ex. 5 *D. P. C.* 600; S. C. 2 *M. & W.* 379.

A verdict after rule for judgment in case of nonsuit will be set aside†.

THE plaintiff, after default made on the 14th, gave a fresh notice of trial for the 18th, when the plaintiff obtained a verdict; but the defendant obtained a rule for judgment as in case of a nonsuit, on the 15th.

The Court set aside the verdict and discharged the rule for judgment on a peremptory undertaking, and payment of costs of the day on the first default, and of the rule.

VIII. RELATIVE TO THE COSTS.

BROWN *v.* TANNER, M. T. 1824. Ex. 1 *M'Clel.* 593.

Costs of motion costs in the cause‡.

ISSUE had been joined in Trinity Term, 1824, and notice of trial had been given for the ensuing assizes held at Oxford on the 28th of July. But the plaintiff's attorney having been engaged in London

In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the affidavit need not state the name of that witness. (*Montfort* v. *Bond*, M. T. 1833, B. C., 2 D. P. C. 403).

* Where a plaintiff has given a peremptory undertaking, (but not by rule), the rule for judgment as in a case of nonsuit, for not fulfilling that undertaking, is nisi in the first instance. (*Vokins* v. *Snell*, M. T., 1833, B. C., 2 D. P. C. 411). But, where a plaintiff has given a peremptory undertaking to try at a particular sittings in term, and he has allowed those sittings to pass without giving notice of trial, judgment absolute may be obtained in the same term. (*Ashton* v. *Johnstone*, H. T. 1840, B. C., 8 D. P. C. 299).

Upon a rule for judgment as in case of nonsuit, the plaintiff must shew some excuse, and the defendant is not obliged to accept a peremptory undertaking, but may make the rule absolute. (*Nicholl* v. *Collingwood*, E. T. 1833, Ex., 2 D. P. C. 60). After a Judge's order for trial before the sheriff of a country cause, the plaintiff omitted to give notice of trial until after the lapse of two sheriff's courts:— Held, that the defendant was not entitled to a rule absolute for judgment as in case of a nonsuit. (*Williams* v. *Edwards*, E. T. 1835, Ex., 3 D. P. C. 660).

† After judgment of nonsuit the cause is over, and therefore no motion can be made to dispauper the plaintiff. (*Jenkins* v. *Hyde*, E. T. 1817, K. B., 6 M. & Selw. 228). The circumstance, that an order to try before the sheriff has been obtained, makes no difference in the time within which judgment as in case of a nonsuit may be moved for, no notice of trial having been given. (*Harle* v. *Wilson*, E. T. 1835, Ex., 3 D. P. C. 658).

‡ Where a rule for judgment as in case of a nonsuit is discharged on a peremptory undertaking, the defendant may still apply for costs of the day. (*Lewis* v. *Thomas*, M. T. 1825, K. B., 6 D. & R. 217). But the Court refused to grant the costs of the day as a condition of discharging the rule for judgment as in case of nonsuit, but would make it a separate part of the order. (*Lenniker* v. *Barr*, E. T. 1832, Ex., 1 D. P. C. 563; S. C. 2 C. & J. 473; vide Reg. Gen., post).

Rule 69 of 1 Reg. Gen. H. T., 2 Will. 4, does not enable the Court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day in disposing of that motion. (*Johnson* v. *Smith*, E. T. 1832, B. C., 1 D. P. C. 421).

Upon an application to enlarge a peremptory undertaking, after several de-

in attending a reference in a cause in this Court, wherein he was himself the plaintiff, from the 21st to the 25th of July, and having been unable to return into the country in time to prepare for the trial, had countermanded the notice. The only question was, whether the plaintiff should pay the defendant the costs of the application, or they should abide the event of the cause, the defendant's counsel insisting that he was entitled to them by the practice in this Court.

Per Cur.—Let them be costs in the cause.

TAYLOR *v.* MONTAGNE, M. T. 1836. Ex. 2 *M. & W.* 315.

In case of bankruptcy security for costs must be given.

THE plaintiff's right of action became by his bankruptcy vested in his assignees, who refused to proceed in the suit—

The Court refused to discharge the rule for judgment as in case of nonsuit, unless security were given for costs.

MUDRY *v.* NEWMAN, T. T. 1834. Ex. 1 *C., M. & R.* 402; S. C. 2 *D. P. C.* 695; S. C. 4 *Tyrw.* 1023.

Though an action be brought without plaintiff's knowledge, he is liable to costs.

THE attorney commenced the action without the plaintiff's knowledge or consent; and the defendant obtained judgment as in case of nonsuit—

The Court held, that the plaintiff was liable for the costs, and his only remedy was against the attorney.

THOMAS *v.* WILLIAMS, E. T. 1825. K. B. 4 *B. & C.* 260.

After the rule for the judgment discharged, a rule may be obtained for the costs.

ON a rule for a judgment as in case of a nonsuit, it was stated that it was laid down in Tidd's Practice, 818, (eighth edition), that the defendant cannot move for judgment as in case of a nonsuit and costs for not proceeding to trial at the same time, nor after moving for the former is he allowed to apply for the latter; and the same rule is laid down in Hullock on Costs, 804, and in Archbold's Practice.

Bayley, B., however, was of opinion, that, notwithstanding what appeared in the books of practice, a rule for costs might be obtained after the rule for judgment as in case of a nonsuit was discharged.

HOCKIN *v.* REID, E. T. 1831. Ex. 1 *C. & J.* 466; S. C. 1 *Tyrw.* 386.

In the Exchequer, the costs of the day should be previously applied for*.

ON motion for judgment as in case of nonsuit—

The Court said, in the Exchequer, the rule is to move for costs of the day before that for judgment as in case of a nonsuit, but it may be done after the latter rule is made absolute, if that be silent as to costs.

faults, the Court will make the plaintiff pay the costs of the last application. (*De Rutzen* v. *John*, H. T. 1836, B. C., 5 D. P. C. 400). And a mere proposal to refer made after the commission day held too late, and not to exempt the plaintiff from liability to pay the costs of the day. (*Eaton* v. *Shuckburgh*, E. T. 1834, Ex., 2 D. P. C. 624).

* By Reg. 69, H. T. 2 Will. 4, no motion for judgment shall be allowed after motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately.

WEST *v.* PRYCE, H. T. 1825. C. P. 2 *Bing.* 455.

The costs of, not allowed to be set-off against the costs of an action by the assignees of plaintiff, a bankrupt.

ON the 27th of November, 1824, judgment as in case of a nonsuit was entered up in an action which had been commenced by the bankrupt before his bankruptcy against the defendant, and in which, after having withdrawn the record at a previous sitting, he had, on the 10th of November, obtained time to enter the issue. On the 22nd of the same month he became bankrupt. The bankrupt's assignees obtained a verdict. A rule was applied for to set off these costs against the costs of the judgment as in case of a nonsuit—

But the Court, though they expressed themselves willing to carry the practice of setting off costs as far as it could be allowed, thought that this was a case to which they were not warranted in extending it, either by precedent or justice; that whether the costs of the nonsuit were or were not recoverable under the bankrupt's commission, there was no mutual credit between the defendant and the bankrupt's assignees, nor were the parties in the two actions the same.

PARTINGTON *v.* WYATT, E. T. 1830. C. P. 6 *Bing.* 171; S. C. 3 *M. & P.* 316.

The Court refused to interfere with the Master's discretion, where the costs of the rule had been referred to him.

A SPECIAL motion for discharging a rule for judgment as in case of nonsuit, upon a peremptory undertaking, ordered to be referred to the officer to tax the costs of the trial, unless the plaintiff should shew sufficient cause to the officer at the time of such taxation, who had refused to allow any—

The Court refused to interfere, as his power was discretionary.

IX. RELATIVE TO SETTING ASIDE*.

Notary.

See tit. *Apprentice.*

POOLE *v.* DUCAS, T. T. 1834. C. P. 1 *Bing. N. S.* 649.

An entry by a notary's clerk is evidence after his death.

IN an action on a bill of exchange, it appeared that the notary's clerk, who presented the bill dishonoured, made an entry at the time in the usual course of business—

The Court held, that upon proof of his death such entry was admissible.

Note, Promissory. See tit. *Bills and Notes.*

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* Where the rule had been obtained for judgment as in case of nonsuit, and judgment signed, the Court refused an application to set aside the rule, on the ground of having been moved contrary to an express understanding between the plaintiff's attorney and the defendant's counsel at an accidental interview. (*Richardson* v. *Peto*, M. T. 1840, Q. B., 9 D. P. C. 73).

Not Guilty*, Plea of. See tits. *Case, Action on—Libel—Slander—Trespass—Trover,* and particular heads.

Notice of Action.

See ante, tit. *Action, Notice of.*

BEECHY *v.* SIDES, T. T. 1829. K. B. 9 *B. & C.* 806.

A party acting bonâ fide under 7 & 8 Geo. 4 is entitled to notice†.

By the act 7 & 8 Geo. 4, c. 30, (for consolidating the laws relating to malicious injuries to property), sect. 41, it is enacted, "That in all actions to be commenced against any person for anything done in pursuance of the act, notice in writing of such action, and the cause thereof, shall be given to the defendant one calendar month before the commencement of the action." In an action brought by A., who, for a supposed malicious injury to property, had been taken into custody by B., who bonâ fide believed that he was acting in execution of the act—

The Court held, that B. was entitled to notice of action.

Notice by Advertisement‡.

Notice of Bail. See ante, tit. *Bail.*

* By Rule H. T. 4 Will. 4, in actions on the case, the plea of "not guilty" shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

By Rule H. T. 4 Will. 4, in actions of trespass quare clausum fregit, the plea of "not guilty" shall operate as a denial that the defendant committed the trespass in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

By the same Rule, in action of trespass de bonis asportatis, the plea of "not guilty" shall operate as a denial of the defendant's having committed the trespass by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

† In an action against excise officers for a seizure, the notice of action must be proved in the first instance, before any other evidence is given.—The plaintiffs slept at different houses, away from their places of business, but a servant slept on the premises of the latter; quære, whether the notice of action properly describes the plaintiffs as of the place of business, the statute requiring it to state their place of abode? (*Johnson* v. *Lord*, M. T. 1830, N. P., 1 M. & M. 444).

‡ Proof of notice being advertised in a country newspaper is not a sufficient proof of notice to a party, without some proof that he took in the paper in question. (*Norwich Navigation Company* v. *Theobald*, H. T. 1828, 1 M. & M. 153).

Notice to Carriers. See, ante, tit. *Carriers.*

Notice to produce. See, ante, tit. *Evidence.*

Notice to Quit.

I. RELATIVE TO, WHEN IT IS OR IS NOT ESSENTIAL, p. 49.

II. RELATIVE TO, BY WHOM TO BE GIVEN, p. 50.

III. RELATIVE TO, TO WHOM TO BE GIVEN, p. 51.

IV. RELATIVE TO THE FORM OF, p. 51.

V. RELATIVE TO THE EFFECT OF, p. 52.

I. RELATIVE TO, WHEN IT IS OR IS NOT ESSENTIAL.

DOE *d.* TILT *v.* STRATTON, M. T. 1827. C. P. 4 *Bing.* 446; S. C. 1 *M. & P.* 183; S. C. 3 *C. & P.* 164.

Although only an agreement for a lease be entered into, a notice to quit must be given*.

THE defendant entered upon an agreement for a lease of seven years, but which was never executed.

The Court held, that during the seven years notice to quit would have been necessary, but not at the end of that period, the original contract being sufficient notice.

DOE *d.* PARKER *v.* BOULTON, E. T. 1817. K. B. 6 *M. & Selw.* 146.

Where an entry is in anticipation, conveyance being executed, no notice to quit need be given.

P., THE lessor of the plaintiff, being seised in fee of lands, having agreed for the sale thereof to W., on or before a certain day, the vendee before that day agreed to let them to the defendant, who, with the permission of the vendor, was let into possession as tenant to W. The conveyance was after the stated day executed, whereby the lands were conveyed to W., but for the use of P. the vendor for a term, subject to a proviso for redemption by W., on payment of the purchase-money, for default of which the ejectment was brought.

The Court held, that the entry and possession of the defendant being only that of W., by anticipation, no notice to quit was necessary.

* And the fear of a distress from a superior landlord does not dispense with notice. (*Rickett* v. *Tullock*, 1833, N. P., 6 C. & P. 66).

II. RELATIVE TO, BY WHOM TO BE GIVEN.

DOE *d.* MANN *v.* WALTERS, H. T. 1830. K. B. 10 *B. & C.* 626.

If by an agent, he must be authorized;

AN agent employed to receive rents gave notice to quit, having no authority at the time to determine the tenancy, and there was no recognition of the authority of the agent before the day of the demise laid in the ejectment.

The Court held, that the mere bringing the action was insufficient.

DOE *v.* ROBINSON, M. T. 1836. C. P. 3 *Bing. N. S.* 477; S. C. 3 *Scott*, 396.

and a notice by an agent of an agent will not do.

THE question turned upon the validity of a notice to quit, given on behalf of the lessors, who were mortgagees to the defendant, the mortgagor in possession. The notice was given by a Mr. Constable, who subscribed himself attorney and agent for the mortgagees; but on the trial he admitted that he neither knew the lands in question nor the lessors; that he received the rent by some general agency, and did not know whence the power originated or by whom it was given; and that he was merely the agent of Messrs. Upton & Son, who were the agents of the mortgagees. A verdict passed for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Per Cur.—There must be a new trial. If we were to allow this verdict to stand without further investigation—that is to say, if we were told that a notice to quit, given by the agent of an agent, is sufficient to maintain an action of ejectment—we should be carrying the law farther than it has been carried before.

DOE *d.* ASTON *v.* SOMERSETT, T. T. 1830. K. B. 1 *B. & Ad.* 135.

A notice to quit by one of several joint-tenants is sufficient*.

IN ejectment, the question was, whether a notice to quit by one of several joint-tenants was binding—

The Court held, that a notice to quit by one of several joint-tenants is sufficient to put an end to the tenancy as to all. Upon a joint demise by joint-tenants, upon a tenancy from year to year, the character of the tenancy is, that the tenant holds the whole of all, so long as *he* and *all* shall please.

DOE *d.* ELLIOT *v.* HULME, T. T. 1828. K. B. 2 *M. & R.* 433.

So, a notice signed by one of several partners enures to the benefit of his co-partners.

IN ejectment, it appeared that the defendant had held under the lessors of the plaintiff by a written agreement, creating a tenancy from year to year, from January, 1827, determinable at three months' notice, without reference to the time of entry. The defendant had been served with a notice to quit, signed by one of the plaintiffs, being partners in trade.

Per Cur.—The question is, whether an authority must not be presumed here. We are of opinion that it must be presumed.

* A notice to quit, given by authority of one of several trustees, joint-tenants, on behalf of them all, is good for all. (*Doe* d. *Kindersley* v. *Hughes*, 1840, Ex., 7 M. & W. 137). As to parish land, see *Doe* d. *Brooks* v. *Fairleigh*, E. T. 1817, K. B., 6 M. & S. 40.

III. RELATIVE TO, TO WHOM TO BE GIVEN.

DOE *d.* JONES *v.* JONES, E. T. 1830. K. B. 10 *B. & C.* 718. —S. P. DOE *d.* NICHOLL *v.* M'KEAG, E. T. 1830. K. B. 10 *B. & C.* 721.

THE minister of a dissenting chapel was permitted by the trustees to occupy a dwelling-house.

No notice to quit need be given to tenant at will*, provided possession be demanded.

The Court held, that having no other estate in the premises than that of a mere tenant at will, it was put an end to by a demand of possession by the trustees, and that they were entitled to recover the possession without any notice to quit.

IV. RELATIVE TO THE FORM OF.

DOE *d.* HUDDLESTON *v.* JOHNSTON, H. T. 1825. Ex. 1 *M'Clel. & Y.* 141; S. C. 4 *B. & C.* 922; S. C. 7 *D. & R.* 411.

A TENANT from year to year, in December, verbally gave his landlord less than six months' notice to quit at the following Lady-day, which was accepted, and the tenant afterwards attended at a letting of the premises by auction and bid, but the new tenant was never let into possession.

A verbal notice less than six months, accepted by the landlord, is not sufficient.

The Court held, that the tenancy was not thereby determined; there being no regular notice, and the facts not amounting to a surrender in law within the Statute of Frauds.

DOE *d.* ARMSTRONG *v.* WILKINSON, M. T. 1840. Q. B. 4 *P. & D.* 323.

IN ejectment, the notice to quit described the premises as a farm at D., being in fact at H. These were distinct parishes, but the defendant could not be misled.

A misdescription of the parish is not material†.

The Court held the notice sufficient.

ROE *d.* DURANT *v.* DOE, T. T. 1830. C. P. 6 *Bing.* 574; S. C. 4 *M. & P.* 391.

IN this case a notice to quit had been given on 28th September, to quit at the following 25th March.

A customary half year's notice is good;

The Court held the notice good as the customary half-year.

DOE *d.* KINDERSLEY *v.* HUGHES, M. T. 1840. Ex. 7 *M. & W.* 139.

IN ejectment, it appeared that the tenant held the land from the 2nd February and the house from 1st May; and a notice, dated

and a notice to quit "at the

* A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it were shewn that some other person and not the widow was the executor or administrator of the tenant; and that it was not incumbent on the landlord to shew that the widow was either executrix or administratrix. (*Rees v. Perrot*, 1830, N. P., 4 C. & P. 230).

† A notice to quit "on St. Michaelmas day," is primâ facie a notice to quit at New Michaelmas; but if the holding be from old Michaelmas, it will be a sufficient notice to quit at that time. (*Doe* d. *Wilks* v. *Perrin*, 1839, N. P., 9 C. & P. 467).

end of your present holding" is sufficient.

16th February, 1838, was given in one notice, to quit and deliver up the farm, lands, and premises, "at the end of your present year's holding."

The Court held this a good notice to quit in the spring of the year 1839, no objection being raised that the land was not the principal subject of the tenancy.

DOE *d.* CAMPBELL *v.* SCOTT, T. T. 1830. C. P. 6 *Bing.* 362; S. C. 4 *W. & P.* 20.

So, a notice to quit a week after end of the tenancy, good*.

IN an action of ejectment, it appeared that a notice to a weekly tenant to quit "on Friday, provided his tenancy expired on Friday, or otherwise, at the end of his tenancy, next after one week from the date of the notice."

The Court held the notice sufficient.

V. RELATIVE TO THE EFFECT OF†.

Nuisance.

I. RELATIVE TO WHAT DOES OR DOES NOT AMOUNT TO.

- (*a*) CONCERNING DISORDERLY HOUSES, p. 53.
- (*b*) CONCERNING EASEMENTS, p. 53.
- (*c*) CONCERNING EFFIGIES, p. 53.
- (*d*) CONCERNING HIGHWAYS, p. 53.
- (*e*) CONCERNING RIVERS, p. 53.
- (*f*) CONCERNING SHOOTING-GROUND, p. 54.
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II. RELATIVE TO, WHO LIABLE FOR, p. 54.

III. RELATIVE TO THE NOTICE TO REMOVE, p. 55.

IV. RELATIVE TO THE REMEDIES.

- (*a*) BY ACTION.
  1. *Pleas*, p. 55.
  2. *Evidence*, p. 55.
  3. *Witnesses*, p. 56.
  4. *Costs*, p. 56.
- (*b*) BY INDICTMENT, p. 56.

* In ejectment against a weekly tenant, the notice proved was to quit on Wednesday, the 4th of August. The witness, who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed the defendant came about a Tuesday or a Wednesday, but had no recollection which:"—Held, insufficient. (*Doe* d. *Finlayson* v. *Bayley*, T. T. 1831, N. P., 5 C. & P. 67).

† Where, after trespass brought, the plaintiff gave defendant a notice to quit the same premises, to which the trespass applied:—Held, that, it acknowledging the defendant to be tenant, he was entitled to a nonsuit. (*Barton* v. *Cory*, E.T. 1825, Ex., 1 M. & Y. 278).

I. RELATIVE TO WHAT DOES OR DOES NOT AMOUNT TO.

(*a*) Concerning disorderly houses*.

(*b*) Concerning easements.

Bower *v.* **Hill**, T. T. 1834. C. P. 1 *Bing. N. S.* 549; S. C. 1 *Scott*, 526.

An action will lie for a nuisance to an easement.

In case for obstructing the plaintiff's right of passage from his close along a public drain or watercourse, by the defendant erecting a bridge and tunnel between the river and the plaintiff's close, the jury found that the passage had been obstructed for sixteen years before such erection between the plaintiff's close and the defendant's premises by being choked with mud, so that the plaintiff could not have the use of it.

The Court held, that, being equally entitled to pass from the river, he was entitled to maintain the action for the lesser obstruction and prevention of future possibility of enjoying the easement by the removal of the mud.

(*c*) Concerning effigies†.

(*d*) Concerning highways.

Wilkes *v.* **Hungerford Market Company**, M. T. 1835. C. P. 2 *Bing. N. S.* 281; S. C. 2 *Scott*, 446.

A private injury by obstructing a public thoroughfare is actionable.

In an action on the case it appeared that the plaintiff suffered damages by loss in his trade, by reason of the defendant's having obstructed the public thoroughfare for an unreasonable time.

The Court held this to be an injury of a private nature, sufficiently entitling the plaintiff to maintain an action.

(*e*) Concerning rivers.

Rex *v.* **Russell**, E. T. 1827. K. B. 6 *B. & C.* 566.

The obstruction of a public river is indictable.

On an indictment for erecting staiths in a public navigable river for the more conveniently loading coals:—Held (per *Bayley* and

* A licensed victualler allowing private balls to be given at his house, on the speculation of strangers, although he derive advantage from supplying refreshments:—Held, not the keeping a disorderly house, subjecting him to the penalties of 25 Geo. 2, c. 36, s. 2. (*Mark* v. *Benjamin*, 1836, N. P., 2 M. & Rob. 225).

† If a party, having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libellous. (*Rex* v. *Carlile*, 1834, C. C. C., 6 C. & P. 636).

Holroyd, JJ., diss. *Tenterden*, L. C. J.), that the jury were properly directed to consider whether such staiths were erected or not in a part of the river where it was reasonable ships should land; whether reasonable space was left for purposes of navigation; whether it was a public benefit, or whether they were extended farther than that required; and whether the public benefit resulting therefrom was greater than the injury they occasioned.

(*f*) Concerning shooting-ground.

Rex *v.* Moore, H. T. 1832. K. B. 3 *B. & Ad.* 184.

Keeping a pigeon shooting-ground may be indictable.

A party keeping a pigeon shooting-ground, and occasioning the collection of idle persons to shoot at stray birds—

The Court held, indictable, as being the probable consequence of such a business, and that he was as much answerable as if it had been his actual object.

(*g*) Concerning trade*.

II. RELATIVE TO, WHO LIABLE FOR.

Rex *v.* Pedley, T. T. 1834. K. B. 3 *N. & M.* 627.

A landlord is not liable for a nuisance committed by his tenant, unless adopted by the former.

In an action on the case, it appeared that a landlord let premises with a nuisance thereon.

The Court held, that the receipt of rent was an upholding the nuisance, rendering him liable for the continuance of it; but where the nuisance is not upon the land at the time of the demise, but the tenants commit a new nuisance, the landlord is not liable.

Rex *v.* Pease, H. T. 1832. K. B. 4 *B. & Ad.* 30.

A railway company cannot be indicted for not erecting a sufficient fence.

A local act for a railroad, and the use of locomotive engines, defined the line of the road by reference to maps, without deviating more than 100 yards, and gave an unqualified authority to use such engines.

The Court held, that as it must have been presumed the legislature were aware of the contiguity of the railroad to the public highway, and probable inconvenience to the public by the passage of the engine, and contemplated the greater benefit by one line of communication as a compensation for the inconvenience to the other, the proprietors of the railroad were justified in the use of the engines, without erecting sufficient fences or screens to prevent the annoyance of the public passing along the highway.

* Where a trade, in its nature, is a nuisance, but from the place where carried on, not such:—Held, that the business being increased by improvements in the mode of conducting it did not render it indictable, unless there was an increase of annoyance, and unless it occasioned more inconvenience than before. (*Rex* v. *Watts*, M. T. 1829, N. P., 1 M. & M. 281).

III. RELATIVE TO THE NOTICE TO REMOVE*.

IV. RELATIVE TO THE REMEDIES.

(*a*) By action.

1. *Pleas.*

BLISS *v.* HAY, H. T. 1838. C. P. 6 *D. P. C.* 442; S. C. 4 *Bing. N. S.* 183; S. C. 5 *Scott*, 500.

Plea, that the obnoxious trade was carried on three years before defendant became possessed, is bad†.

THIS was an action on the case for carrying on the business of a tallow-chandler in premises adjoining the plaintiff's house. On demurrer to a plea alleging such business to have been carried on for three years next before the plaintiff's becoming possessed—

The Court held the plea bad.

FLIGHT *v.* THOMAS, T. T. 1839. Q. B. 7 *D. P. C.* 741; S. C. 2 *P. & D.* 531; S. C. 10 *A. & E.* 590.

And semb., so a plea, that the trade was carried on for twenty years prior to the commencement of the suit.

IN case for nuisance, the declaration alleged as a nuisance, that the defendant had upon his own ground a mixen or dungheap, upon which all kinds of rubbish and offensive matter were deposited; and that the smell arising therefrom, and engendered thereby, was a great annoyance to the plaintiff in the enjoyment of his property. The pleas were, first, not guilty; secondly, possession for more than twenty years of a certain house and premises, and the enjoyment for that or a greater period of the right to use, to make, and have the said mixen as an easement belonging to the said premises. Replication traversed, that the defendant had, for and during the said period, the right and enjoyment of the said mixen.

Per Cur.—In order to support the defendant's plea, the claim must be shewn to be that of an easement over the plaintiff's land. On the face of the pleadings, no such claim is shewn; a decision of any of the other points becomes unnecessary.

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2. *Evidence*‡.

* In case for a nuisance, notice to remove the nuisance, left at the premises, is evidence against a subsequent occupier. (*Salmon* v. *Bensley*, M. T. 1825, N. P., 1 Ry. & M. 189).

† In an action for a nuisance, where the defendant pleads not guilty, the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it. (*Dawson* v. *Moore*, H. T. 1835, N. P., 7 C. & P. 25).

The London Dock Act, (39 & 40 Geo. 3, c. 47, s. 151), enacts, that no action shall be commenced against any person for any thing done in pursuance of that act after six calendar months next after the fact committed. The London Dock Company had, two years before the commencement of this action, undermined the wall of a wharf, in one undivided third part of which the plaintiff's father then had a life interest, with remainder to his son in fee. In consequence of this undermining the wall fell, but after the plaintiff's title accrued:—Held, that the son might maintain this action, although the wall was undermined during the life-time of the father:—Held, also, that the action having been brought within six months after the falling of the wall, was sufficient. (*Gillon* v. *Boddington*, 1824, N. P., 1 C. & P. 541; S. C. 1 Ry. & M. 161. See *Bless* v. *Hall*, 5 Scott, 500; *Elliotson* v. *Feetham*, 2 Bing., N. S., 134; S. C. 2 Scott, 174.

‡ In an action on the case for placing lighted brimstone in a church tower, whereby the plaintiff, who, with others, was ringing the bells, was annoyed by the

3. *Witnesses*.*

4. *Costs.*

SHUTTLEWORTH *v.* COCKER, M. T. 1840. C. P. 9 *D. P. C.* 76; S. C. 2 *Scott, N. S.* 47.

1*s.* damages entitles the Judge to certify for the plaintiff under the 3 & 4 Vict. c. 24, s. 2.

IN case for a nuisance by the defendant's manufactory, and a verdict with 1*s.* damages—

The Court held, that the action was to try a right beyond the mere claim of damages, and within the principle of 3 & 4 Vict. c. 24, s. 2, and the Judge empowered to certify for the plaintiff; but such certificate must be given at the termination of the trial.

COCKS *v.* PEACHEY, T. T. 1828. K. B. 2 *M. & Ry.* 420.

A plaintiff is not entitled to costs of witnesses called to prove damages not found for him.

IN an action for a nuisance, the jury found for the plaintiff as to part only of the declaration.

The Court held, that, although the verdict was entered generally for the plaintiff, the Master properly disallowed the expenses of witnesses called to prove damages negatived by the jury.

(*b*) BY INDICTMENT.

REX *v.* TINDALL, H. T. 1836. K. B. 1 *N. & P.* 719.

On an indictment, a nuisance will not be inferred†: the fact must be found by the jury.

UPON an indictment for a nuisance in a public harbour, by erecting piles, and thereby obstructing and rendering it insecure, the verdict found that, by the defendant's works, the harbour was in some extreme cases rendered less secure.

The Court held, that the Court could not necessarily infer that the works must be a nuisance for which the defendants were criminally responsible.

fumes, the defendant pleaded, first, the general issue; and, second, that the plaintiff was wrongfully in the church tower, making a disturbance, and that the rector requested him to depart; and that, as he would not, the defendant, by the command of the rector, placed and lighted the brimstone to cause the plaintiff to depart:—Held, that, to support the special plea, evidence must be given of the request to depart, and also of the rector's authority to the defendant to put the brimstone:—Held, also, that, to entitle the plaintiff to a verdict on the general issue, the jury must be satisfied that the plaintiff sustained some substantial damage from the fumes of the brimstone. (*Evans* v. *Lisle*, 1836, N. P., 7 C. & P. 562).

* On the trial of an action for a nuisance, a witness for the plaintiff may be asked whether he has not heard the plaintiff say that he had preferred eight indictments against the proprietors of the works, which in the present action were charged to be a nuisance:—Held, also, that a witness might be asked what he had heard the plaintiff say, when the plaintiff was examined as a witness on the trial of one of those indictments. (*David* v. *Greenfell*, 1834, N. P., 6 C. & P. 624).

† Where a statute enacts, that the erection of a building within certain limits shall be deemed "a common nuisance," and also gives a summary remedy by proceedings before magistrates, the offender may be indicted for the nuisance. (*Rex* v. *Gregory*, M. T. 1833, K. B., 2 N. & M. 478).

A certificate and license to slaughter horses, under 26 Geo. 3, c. 71, cannot justify or legalize a nuisance; if the party, however, had established his trade in a remote place, and houses were afterwards built near, he would be entitled to

REX *v.* CURWOOD, T. T. 1835. K. B. 5 *N. & M.* 369; S. C. 3 *Ad. & E.* 815.

ON an indictment for a nuisance—

The defendant is entitled to notice of the nuisance intended to be proved*.

The Court ordered the prosecutor to give the defendant notice of the nuisances intended to be proved; and a rule for that purpose may be obtained without any affidavit, but upon reading the indictment only.

REX *v.* WARD, H. T. 1836. K. B. 6 *N. & M.* 38; S. C. 4 *Ad. & E.* 384, *overruling the dictum in* REX *v.* RUSSELL, E. T. 1827, K. B., 6 *B. & C.* 566, *of Bayley*, J., ante, p. 53.

An obstruction which the jury find to be a nuisance, though a convenience, entitles the Crown to judgment†.

UPON an indictment for obstructing a navigable river by the erection of a projecting embankment and causeway for landing, &c., the verdict of the jury being that they considered it to be a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration by the defendant.

The Court held, that the Crown was entitled to the verdict, disapproving of the principle of considering whether the act indicted as a nuisance was productive of more public benefit than public inconvenience.

Nul Tiel Record.

KIRBY *v.* SIGGARS, T. T. 1834. C. P. 4 *M. & Scott*, 481.

If the defendant irregularly makes up the

THE plaintiff had issued a writ out of C. P., but never served it, and he afterwards issued a writ out of the Exchequer, on which he proceeded, and the defendant pleaded another action pending

continue such trade, however noxious. (*Rex* v. *Cross*, M. T. 1826, N. P., 2 C. & P. 483).

By a private act of Parliament, all houses for the slaughtering of horses within one thousand yards of a certain workhouse are to be deemed public nuisances, and removed; but if they existed before the act, the owners are to receive a compensation:—Held, that if an indictment be framed at common law, with counts on that act, the defendant may be convicted if he so carried on the trade as to make it a public nuisance, and that he is not entitled to any compensation. (*Rex* v. *Watts*, M. T. 1826, N. P., 2 C. & P. 486).

* In an indictment for a nuisance in stopping up the course of a river, by throwing in the mud, the act appearing permanent, the Court refused the defendant a rule for the particulars of the dates of the acts in question, but granted it as to the acts themselves. (*Reg.* v. *Flower*, T. T. 1839, B. C., 7 D. P. C. 665).

To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses. (*Rex* v. *Neill*, M. T. 1826, N. P., 2 C. & P. 485).

In an indictment against a gas company for a nuisance in conveying the refuse of gas into a great public river, whereby the fish are destroyed and the water is rendered unfit for drinking, &c., the question for the jury is, whether the acts done by the particular company complained of amount to a nuisance. (*Rex* v. *Medley*, H. T. 1834, N. P., 6 C. & P. 292).

† Where a verdict was found for the Crown on an indictment for a nuisance, and the case referred by consent to an arbitrator, the nuisance remaining unabated:—Held, that the defendant ought to have notice and copies of the affidavits before the motion for judgment made. (*Reg.* v. *Gore*, M. T. 1839, B. C., 8 D. P. C. 102).

roll it will be cancelled*.

for the same cause, to which the plaintiff replied nul tiel record, the defendant having irregularly himself made up a roll from the præcipe—

The Court ordered it to be cancelled with costs.

Office and Officer.

I. IN GENERAL.

(*a*) Relative to offices, p. 58.

(*b*) Relative to officers.

1. *Duties and Liabilities of*, p. 59.
2. *Removal of*, p. 60.

(*c*) Relative to agreements as to the fees, p. 61.

(*d*) Remedies connected with.

1. *By Action*, p. 61.
2. *Indictment.* See tit. *Indictment.*
3. *Mandamus.* See tit. *Mandamus.*
4. *Quo Warranto.* See tit. *Quo Warranto.*

II. IN PARTICULAR. See tits.

Army,
Churchwarden,
Constable,
Corporation,
Excise and Custom,
Highway,
Justice of the Peace,
Overseer,
Petty Bag Office,
Poor Rate,
Prison and Prisoner,
Sheriff,
Vestry Clerk.

I. IN GENERAL.

(*a*) Relative to offices†.

Rex *v.* Pattison, H. T. 1833. K. B. 4 *B. & Ad.* 9.

If a statute is only directory that a county treasurer shall find security it is not a con-

On a quo warranto, it appeared that the statute was only directory, that the person appointed county treasurer should give security.

The Court held, that it was not made a condition precedent to the enjoyment of the office, or to the liability to account for monies

* Amendment of the prayer of the replication to a plea of nul tiel record allowed after trial of the issue. (*George* v. *Rookes*, E. T. 1840, B. C., 8 D. P. C. 505). Where upon an issue of nul tiel record the plaintiff gave notice to the defendant to produce the record:—Held, that, not having given a four-day rule, he could not move for judgment for not producing it. (*Beybie* v. *Grenville*, H. T. 1835, Ex., 3 D. P. C. 502).

† In King's Bench all offices (the Rule Office excepted) are to be open in term time from eleven in the forenoon till five in the afternoon, and not in the

received by virtue of the office, and, therefore, that the pleadings tendering issues on such an immaterial fact were bad, the party appointed being also an alderman and virtute officii a justice of the peace:—Held, also, that the acceptance of the office of county treasurer did not absolutely avoid the office of justice, unless it were made by or with the privity of that authority which had the power to accept the surrender of the first or to remove from it, but that the offices were incompatible, and the acceptance of such incompatible office a ground of a motion.

dition precedent. It seems that such an office and being a magistrate are incompatible.

REX *v.* DAY, T. T. 1829. K. B. 9 *B. & C.* 702.

THE affidavit, on an application for a quo warranto for exercising an office, alleged to have been vacated by the acceptance of a second office incompatible with the first, only stated the belief that he exercised the second office, but did not shew any valid appointment thereto.

The Court held the affidavit insufficient.

To establish one office incompatible with another, a valid appointment must be shewn.

(*b*) RELATIVE TO OFFICERS*.

1. *Duties and Liabilities of.*

GIMBERT *v.* COYNEY, T. T. 1825. Ex. 1 *M'Clel. & Y.* 469.

IN trespass against magistrates for a levy made under a warrant, upon a conviction of plaintiff, the headborough of C., in the county of S., for refusing to execute a warrant for apprehending a party; the warrant was addressed to the constable of C. and all other

An officer cannot act out of his precinct even under a warrant†.

evening; and the Rule Office is to be open in term time from eleven in the forenoon till three in the afternoon, and from six till eight in the evening. (*Reg. Gen.*, T. T. 1837, K. B., 5 Dowl. P. C. 645). All offices are to be open in vacation from eleven in the forenoon till three in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven till two in the afternoon only. (*Ib.*). In Common Pleas, all offices (the Secondaries' excepted) are to be open in term from eleven in the forenoon till five in the afternoon, and not in the evening. And the Secondaries' Office is to be opened in term from eleven in the forenoon till three in the afternoon, and from six till eight in the evening; and in the vacation all the offices are to be open from eleven in the forenoon till three in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the forenoon till two in the afternoon only. (*Reg. Gen.*, T. T. 1837, C. P., 3 Bing. N. S. 977).

* Unless there be a custom to the contrary, the right to demand a poll is by law incidental to the election of parish officers. (*Campbell* v. *Maund*, M. T. 1836, C. P., 1 N. & P. 558; S. P. *Reg.* v. *St. Mary, Lambeth*, T. T. 1838, Q. B., 3 N. & P. 416).

† Where writs of capias from a borough court were directed to the serjeant-at-mace, and others appointed by him, who always gave him an indemnity, he dismissed them at pleasure and received the fees for execution of the process, and he was always ruled to return the writs, and for not returning attachments issued against him and bail-bonds taken in his name:—Held, that such officers so appointed by him were to be deemed his officers, and to be liable to answer for their default as for escape. (*Morris* v. *Parkinson*, T. T. 1834, Ex., 1 C., M. & R. 163; abridged, ante, tit. *Escape*). Where money taken from a party charged was detained by a police constable after the trial of the party charged:—Held, that, in order to maintain an action against the commissioners of police, it must be distinctly proved that the money reached them. (*Green* v. *Rowan*, E. T. 1835, N. P., 7 C. & P. 48).

peace officers in the county of S.; and it appeared that the party to be apprehended lived out of his district.

The Court held, that before the 5 Geo. 4, c. 18, a constable, though named in the warrant, was not bound to execute it out of his precincts, and that the act imposes no such obligation, but meant no more than to authorize those officers to execute warrants out of their precincts, and to put warrants addressed to them only by their description of official character on the same footing as warrants addressed to them by name.

HUTCHINGS *v.* MORRIS, E. T. 1827. K. B. 6 *B. & C.* 464.

Excise officers are not bound before demand to return goods improperly seized.

IN an action on the case against excise officers for misconducting themselves as to goods taken on a distress for a penalty, after the same had been paid—

The Court held, that it was no part of their duty to return the goods, and, there having been no demand for their restoration, the detention was not unlawful.

HARDING *v.* STOKES, E. T. 1836. Ex. 1 *M. & W.* 354.

A promise to give employment for hire and reward is a *reward* within the stat. 5 & 6 Will. 4, c. 76, s. 54*.

IN an action of debt, the declaration for a penalty in the 5 & 6 Will. 4, c. 76, s. 54, for bribery at the election of councillors, alleged that the defendant did not corrupt an elector, by corruptly promising to give him employment in hauling stones for certain hire and reward to be paid for the same, as a reward for his giving his vote for certain candidates—

The Court held, that the declaration was good, an employment being a reward within that part of the section which imposes the penalty on the person corrupting; and that, as an employment in hauling stones might be a corrupt engagement, and it was alleged in this declaration to be a corrupt bargain, the Court were bound to hold it to be so, though that was properly a question for the jury.

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2. *Removal of.*

SMYTH *v.* LATHAM, E. T. 1833. C. P. 9 *Bing.* 692; S. C. 3 *M. & Scott*, 251; S. C. 1 *C. & M.* 547; S. C. 3 *Tyrw.* 509.

The office of paymaster of

UPON a bill of exceptions—

The Court held, that, in the legal construction of the 48 Geo. 3,

* Which enacts, "That if any person who shall have, or claim to have, any right to vote in any election of mayor, or of a councillor, auditor, or assessor, of any borough, shall, after the passing of this act, ask or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, or employment, or other reward whatsoever, to give or forbear to give his vote in any such election; or, if any person, by himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt or procure any person to give, or forbear to give, his vote in any such election, such person so offending, in any of the cases aforesaid, shall, for every such offence, forfeit the sum of 50*l.* of lawful money of Great Britain, to be recovered, with full costs of suit by any one who shall sue for the same, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster; and any person offending in any of the cases aforesaid, being lawfully convicted thereof, shall for ever be disabled to vote in any election in such borough, or in any municipal or parliamentary election whatever in any part of the United Kingdom; and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he then shall, or any time afterwards may be entitled, as a burgess of such borough, as if such person was naturally dead."

c. 1, the office of paymaster of Exchequer bills was held as a tenure during pleasure only, and not during good behaviour or for life of the grantee, and that the appointment of one paymaster in the room of another was of itself a revocation of the appointment of the latter, and that notwithstanding it contained no power of revocation.

the Exchequer bills is only during pleasure.

REX *v.* HARRIS, H. T. 1831. K. B. 1 *B. & Ad.* 936.

A TOWN-CLERK entitled to, and who had appointed, a deputy, had left the country upon a bill of indictment for forgery found against him, and never returned, nor was it known where he was; after which his deputy died; and the corporation, at a meeting by adjournment of one of the grand common days, resolved to remove him for neglecting to attend, by himself or deputy, at that and other meetings.

A town-clerk who has absconded, to avoid an indictment for forgery, may be removed.

The Court held, that such removal was properly made, it being to be presumed that he had left the country without any intention of returning; and that it was no objection that no summons had been served upon him, he not being within reach, nor that no previous notice had been given to the members of the corporation of the purposes of the meeting.

(*c*) RELATIVE TO AGREEMENTS AS TO THE FEES.

WALDO *v.* MARTIN, T. T. 1825. K. B. 4 *B. & C.* 319; S. C. 6 *D. & R.* 364; S. C. 2 *C. & P.* 1.

A., WHO held an office for life in the gift of B., agreed with C. to resign, and to procure the appointment for him, and C., in consideration thereof, agreed that A. should have a moiety of the profits. A. resigned, and through his influence C. was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office—

An agreement as to fees in the Pipe-office, not communicated to the party appointing, is void.

The Court held, that the agreement was a fraud upon B., and therefore illegal and void,

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(*d*) REMEDIES CONNECTED WITH.

1. *By Action**.

SIDDON *v.* EAST, E. T. 1830. Ex. 1 *C. & J.* 12.

THE plaintiff had been arrested on process for not appearing to an information, and had commenced an action of debt against an officer, to recover the penalty of 50*l.*, under 32 Geo. 2, c. 28, for taking him to gaol within twenty-four hours.

An excise officer is entitled to remove the cause into the Exchequer of Pleas.

Held, that, as the defendant was acting in the execution of his duty as an officer of excise when he committed the act complained of, he was entitled to the privilege of removing the action into the office of Pleas in the Exchequer.

* Proof that a person had acted as a public officer on one occasion, before the occasion in question, is evidence to go to the jury that he is such officer. (*Reg.* v. *Murphy*, 1837, N. P., 7 C. & P. 297).

CHARRINGTON *v.* MEATHERINGHAM, M. T. 1836. Ex. 5 *D. P. C.* 313; S. C. 2 *M. & W.* 142.

A parish officer, who distrains for poor rates, is not entitled to treble costs, under 43 Eliz. or 13 & 14 Car. 2.

TRESPASS against a parish officer for distraining for poor rates and highway rates. At the trial the plaintiff was nonsuited for not proving a notice of action. The Master taxed the plaintiff his treble costs.

Per Cur.—An overseer of the poor, who is sued for distraining for poor rates and highway rates, is not entitled to treble costs, when the plaintiff is nonsuited, under 43 Eliz. or 13 & 14 Car. 2.

Order of a Judge. See tits. *Judge's Order—Rules and Motions.*

Order of Justices. See tit. *Justices of the Peace.*

Order of Reference. See tit. *Arbitration.*

Order of Sessions. See tits. *Poor—Sessions.*

Original Writ (abolished). See tit. *Process.*

Ouster. See tit. *Ejectment.*

Outlawry.

I. RELATIVE TO THE 2 WILL. 4, c. 39, p. 63.

II. RELATIVE TO THE COURT, p. 64.

III. RELATIVE TO THE PROCESS TO FOUND, p. 64.

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I. RELATIVE TO THE 2 WILL. 4, c. 39.

The 2 Will. 4, c. 39, s. 5, regulates proceedings to outlawry before judgment,

BY 2 Will. 4, c. 39, s. 5, it is enacted, "That, upon the return of non est inventus as to any defendant, against whom a writ of capias shall have been issued, and also upon the return of non est inventus and nulla bona as to any defendant against whom a writ of distringas, as mentioned in the statute, shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of exigi facias and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of capias ad respondendum, issued after an original writ: Provided always, that every such writ of exigent, proclamation, and other writ subsequent to the writ of capias or distringas, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of capias or distringas, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of capias or distringas shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed."

and sect. 6 after judgment;

By sect. 6, it is enacted, "That after judgment given in any action commenced by writ of summons or capias under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: Provided always, that every outlawry or waiver had under the authority of this act shall and may be vacated and set aside by writ of error or motion, in like

manner as outlawry or waiver founded on an original writ may now be vacated or set aside."

and sect. 7 directs a filazer to be appointed in the Court of Exchequer.

By sect. 7, it is enacted, "That for the purpose of proceeding to outlawry and waiver upon such writs of capias or distringas, returnable in the Court of the Exchequer, it shall and may be lawful for the Lord Chief Baron of the said Court, and he is hereby required, to appoint from time to time a fit person, holding some other office in the said Court, to execute the duties of a filazer, exigenter, and clerk of the outlawries in the same Court."

II. RELATIVE TO THE COURT*

III. RELATIVE TO THE PROCESS TO FOUND.

RAYER *v.* COOKE, M. T. 1824. K. B. 3 *B. & C.* 529; S. C. 5 *D. & R.* 302.

The third proclamation must be made in the parish where the defendant resides at the time of the outlawry†.

THE third proclamation was made in the parish and county of which the defendant was described to be, in the writ and in the bond on which the action was brought, but not in the parish in which he resided at the time when the outlawry took place.

The Court held, that it fell strictly within 31 Eliz. c. 3, and was, therefore, to be considered as if no proclamation had been made.

REX *v.* POWELL, E. T. 1836. Ex. 1 *M. & W.* 321.

If the return be defective it may be amended‡.

THE sheriff to the writ of capias utlagatum returned, "no goods, nor any lay fee within his bailiwick, but that the defendant was a beneficed clergyman," without stating where or what the benefice consisted of—

The Court refused a rule for a sequestration, but intimated that the plaintiff should be called upon to amend the return.

* A defendant may now be outlawed in the Exchequer. (*Jones* v. *Price*, E. T. 1833, Ex., 2 D. P. C. 42; see supra, 2 Will. 4, c. 39, s. 7).

† Proceedings to outlawry cannot be taken on a writ of distringas originally issued to compel an appearance. (*Vere* v. *Gowar*, H. T. 1837, C. P., 5 D. P. C. 494; S. C. 3 Bing. N. S. 503; S. C. 4 Scott, 287). But a distringas with a view to outlawry may issue in continuation of writs previously sued out to save the Statute of Limitations. (*Ray* v. *Dow*, M. T. 1836, Ex., 5 D. P. C. 310). A writ of capias may be issued into a county different from that in which the writ itself describes the defendant as resident; and proceedings to outlawry founded on such a writ are regular. (*Morris* v. *Davies*, M. T. 1835, B. C., 4 D. P. C. 317).

‡ A capias or distringas issued with a view to outlawry must be lodged with the sheriff fifteen days *at least* before it is returnable. (*Norman* v. *Winter*, H. T. 1839, C. P., 7 Scott, 251).

IV. RELATIVE TO WHAT PROPERTY MAY BE TAKEN UNDER.

REX *v.* HIND, E. T. 1831. Ex. 1 *C. & J.* 389; S. C. 1 *Tyrw.* 347.

Under an outlawry sequestration allowed.

UPON the return to special writs of capias utlagatum, that the defendant was possessed of benefices, but of no lay fee—

The Court ordered, upon reading the transcript of outlawry and the inquisition, a sequestration.

V. RELATIVE TO THE RIGHTS AND DISABILITIES OF.

ALDRIDGE *v.* BULLER, T. T. 1837. Ex. 5 *D. P. C.* 733; S. C. 2 *M. & W.* 412.

An outlaw can only appear in Court to reverse an outlawry.

THE defendant, in this action, having been outlawed in the month of May, 1836, in an action brought against him by another party in February, 1837, obtained judgment as in case of a nonsuit against the present plaintiff. In March, 1837, he sued out a writ of habeas corpus ad satisfaciendum, directed to the Marshal of the King's Bench Prison, in whose custody the plaintiff was in an action, for the purpose of charging him in execution for costs.

Lord *Abinger*, C. B.—It is a perfectly clear principle that an outlaw can come into a court of justice for no purpose except that of reversing his outlawry. He has no locus standi. Here, he is seeking to make use of the process of the Court to enforce a claim. He has no right to do so.

REGINA *v.* INSOLVENT COMMISSIONERS, T. T. 1838. Q. B. 3 *N. & P.* 543.

In one case, it was held that an outlaw may be discharged under the Insolvent Act*.

A PRISONER was in custody under a capias utlagatum for non-payment of damages and costs in an action for criminal conversation—

The Court held him entitled to apply to be discharged under the 7 Geo. 4, c. 57 (Insolvent), although the outlawry was not reversed.

* Where a defendant had been outlawed, but had been discharged by the Insolvent Debtors' Court from the judgment in respect of which the outlawry took place, the Court allowed him to be heard in opposition to a motion made by the plaintiff to charge him in execution on the same judgment. The effect of such discharge by the Insolvent Debtors' Court is to relieve the defendant, not only from the judgment in the action, but from the outlawry also, and there was nothing to charge in execution; (*Abthorpe* v. *Fiske*, M. T. 1839, C. P., 8 D. P. C. 66; S. C. 6 Bing. N. S. 17; S. C. 8 Scott, 138); but in another case it was held, that an outlaw is not entitled to be discharged under the Insolvent Debtors' Act. (*Hamlin* v. *Crossely*, M. T. 1838, Q. B., 8 Ad. & E. 677). And a party outlawed on civil process after judgment, and, on his petition subsequently made to the Insolvent Debtors' Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule. (*Dickson* v. *Baker*, M. T. 1834, K. B., 3 N. & M. 775; S. C. 1 Ad. & E. 853; S. C. 2 D. P. C. 517; abr., post, div. XI.).

A defendant in a suit in equity having been taken under an attachment out of Chancery, a writ of capias utlagatum was lodged with the sheriff against him at the suit of the same plaintiff; and the attachment having been afterwards set aside for irregularity—Held, that the detainer under the capias utlagatum was

VI. RELATIVE TO THE INQUISITION*.

VII. RELATIVE TO THE EFFECT OF.

REX *v.* COOKE, H. T. 1825. Ex. 1 *M'Clel. & Y.* 197.

By outlawry the personal property immediately vests in the Crown.

AFTER outlawry, but before the issuing the capias utlagatum, a fieri facias issued at the suit of judgment creditors.

The Court held, that they thereby acquired no priority over the claim of the prosecutor of the outlawry to have the proceeds upon a grant from the Treasury. By bare outlawry, the personal goods become immediately forfeited and vested in the King, and there is no distinction between an outlawry at the suit of an individual and at the suit of the Crown.

ABTHORPE *v.* FISKE, M. T. 1839. C. P. 8 *D. P. C.* 66; S. C. 6 *Bing. N. S.* 17; S. C. 8 *Scott*, 138.

After the outlaw had been rendered by his bail on a judgment, and discharged by the Insolvent Act, he cannot be charged in execution on the judgment.

A PARTY, outlawed for debt, had been rendered by his bail, and discharged by the adjudication of the Insolvent Debtors' Court from the debt in respect of which the proceedings to outlawry took place; the plaintiff now sought to charge him in execution on the writ of capias utlagatum.

The Court held, that, when the return to the writ of habeas corpus, under which the defendant is brought up to be charged in execution, states, as the only cause of detainer, the judgment upon which the process of outlawry issued, and from which he is discharged, the Court will discharge the party altogether, there being no good cause of detention set forth in the return of the writ.

VIII. RELATIVE TO THE SHERIFF PAYING OVER THE MONEY.

REX *v.* BUCHANAN, M. T. 1832. Ex. 1 *C. & M.* 195; 3 *Tyrw.* 229.

If a defendant dies abroad, the payment of the money over by the sheriff will be stayed until that fact be determined.

AFTER the writ of capias utlagatum issued, and petition that the money might be paid over by the sheriff, and the King's warrant and consent of the Attorney-General were granted in ignorance of the death of the defendant abroad.

The Court held, that it did not amount to an appropriation of the money, and an order was therefore made, at the instance of the personal representatives, to stay it until the fact of the death was determined on an issue taken on the plea.

irregular, and that the defendant was entitled to his discharge; and that it must be considered, for this purpose, to be the process of the party, and not of the Crown. (*Hall* v. *Hawkins*, H. T. 1839, Ex., 7 D. P. C. 200; S. C. 4 M. & W. 590).

* An inquisition in outlawry, in the Exchequer, is returned into the Queen's Remembrancer's Office; therefore, a motion relating to it should be made through the medium of one of the side clerks. (*In re Otho Manners*, T. T. 1839, Ex., 7 D. P. C. 516; S. C. 5 M. & W. 278).

IX. RELATIVE TO SETTING ASIDE AND STAYING PROCEEDINGS.

LEWIS *v.* DAVISON, M. T. 1834. Ex. 1 *C., M. & R.* 655; S. C. 3 *D. P. C.* 272; S. C. 5 *Tyrw.* 198.

The rule should be drawn up on reading the original writ*.

ON motion to set aside proceedings to outlawry, on the ground of irregularity, being a variance from the forms of the indorsement on the capias given by the Uniformity of Process Act—

The Court held, that the rule could only be drawn up on reading the original writ.

X. RELATIVE TO AMENDMENTS AFTER.

GREEN *v.* KETTLEBY, T. T. 1840. Ex. 8 *D. P. C.* 783; S. C. 6 *M. & W.* 731.

After appearance in outlawry the Court will not allow the writ to be amended.

THE plaintiff, in an action of debt, after a distringas sued out, and process to outlawry, the defendant not having rendered on the exigent, nor obtained a supersedeas, but having entered an appearance before the last proclamation, wherefore the plaintiff proceeded no farther in the outlawry, but, having another cause of action, commenced an action in assumpsit.

The Court refused to set aside the appearance in the first action, or to allow the writ to be amended by changing it into the form of assumpsit.

* Where it was sworn, and not denied by the plaintiff, that he knew where the defendants lived during the time of suing out the process, the Court set aside the judgment with costs. (*James* v. *Jenkins*, M. T. 1824, C. P., 9 Moore, 590). And where the plaintiff, knowing that the defendant was abroad, but was represented by an attorney, proceeded to outlawry, without making any application to such attorney, the Court set aside the outlawry as an abuse of process. (*Pigon* v. *Drummond*, E. T. 1834, C. P., 1 Bing. N. S. 354; S. C. 1 Scott, 264). Semble, that the Court will make a conditional order for setting aside an outlawry in order to prevent an insolvent from remaining in custody unnecessarily. (*Nicholson* v. *Nichols*, H. T. 1835, B. C., 3 D. P. C. 326). But where a plaintiff proceeded against a defendant here and in America for the same cause of action, and the defendant was arrested in America, and took the benefit of the Insolvent Act there, the Court would not, on that ground, set aside the proceedings to outlawry, which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors. (*Probert* v. *Rogers*, M. T. 1834, Ex., 3 D. P. C. 170). And where the last proclamation was in August, and the defendant did not apply to set aside the proclamation until the Michaelmas Term, he appearing to have known of the commencement:—Held, too late. (*Anderdon* v. *Alexander*, M. T. 1833, Ex., 2 D. P. C. 267). So, the Court will not set aside an outlawry merely on the ground of the defendant having constantly appeared in public during the proceedings against him; semble, that the Court would set it aside, if it appeared that the party had notice of them. (*Johnson* v. *Driver*, M. T. 1831, B. C., 1 D. P. C. 127).

Where judgment had been affirmed in the Court of error, but the plaintiff had been outlawed in another suit, in which he was defendant, the Court of error stayed the proceedings on bringing into Court the debt and costs, and paying the costs of the writ of error, the outlawry shewing that the money belonged not to the plaintiff, but to the Crown. (*Grant* v. *Bryant*, E. T. 1817, K. B., 6 M. & Selw. 347).

Where the plaintiff was an outlaw at the time of bringing his action, but the defendant did not know of it till after plea pleaded, and notice of trial given, the Court, after verdict, granted a rule to stay the proceedings, which was afterwards discharged on the reversal of the outlawry after granting the rule. (*Somers* v. *Holt*, E. T. 1840, B. C., 8 D. P. C. 506).

XI. RELATIVE TO THE REVERSAL OF.

(*a*) Since 1 & 2 Vict. c. 110*.

(*b*) Grounds of.

Dickson *v.* Baker, T. T. 1834. K. B. 3 *N. & M.* 775; S. C. 1 *Ad. & E.* 853; S. C. 2 *D. P. C.* 517.

Taking benefit of Insolvent Act no ground for reversal.

On motion to reverse an outlawry—

The Court refused, on the ground of the party having taken the benefit of the Insolvent Act, and inserted the debt in his schedule; it has no authority, except for error apparent on the proceedings.

Bryan *v.* Wagstaff, E. T. 1826. K. B. 5 *B. & C.* 314; S. C. 8 *D. & R.* 208.

A departure before award of exigi facias no ground for refusing to reverse.

In error to reverse outlawry, assigning for error that, before and at the time of awarding and issuing the writ of exigi facias, the defendant was in parts beyond the seas, to which the defendant pleaded that the plaintiff *was guilty* of fraud and covin, and in order to avoid the outlawry voluntarily went &c., and issue and verdict thereon for the defendant. The plaintiff afterwards moved to enter judgment for himself non obstante veredicto; but—

The Court held, that a departure before the awarding of the exigi facias, though for the purpose of avoiding a suit and delaying the creditor, was not a sufficient ground to prevent the reversing an outlawry.

(*c*) Affidavit to reverse.

Plunkett *v.* Buchanan, H. T. 1825. K. B. 3 *B. & C.* 736; S. C. 5 *D. & R.* 625.—S. P. Houlditch *v.* Swinfen, E. T. 1836. C. P. 3 *Scott*, 169; S. C. 2 *Bing. N. S.* 712.

A defendant who seeks to reverse an outlawry must appear, or the affidavits must shew the attorney was authorized.

On motion for reversing an outlawry on payment of costs, and on the defendant putting in and perfecting bail in the alternative of satisfying the judgment or rendering the defendant; a preliminary objection was taken, that it did not appear on the affidavit in support of the rule that the application was made at the instance and by the authority of the outlaw.

The Court were clearly of opinion, that, where the party did not appear in person, it should be expressly stated in the affidavits that the attorney was authorized by him to make the application on his behalf.—Rule discharged.

* Since the 1 & 2 Vict. c. 110, the outlawry will be reversed on payment of costs, and entering a common appearance, unless it appear the defendant is abroad. (*Bank of England* v. *Reid*, M. T. 1840, Ex., 8 D. P. C. 848; S. C. 7 M. & W. 159). And where an action was commenced before the 1 & 2 Vict., and outlawry awarded and completed during the party's absence abroad, before the passing of the statute, the Court, on terms, set aside the outlawry after the statute came in operation. (*Harvey* v. *O'Meara*, T. T. 1839, B. C., 7 D. P. C. 725).

(*d*) Terms of reversal, and herein of the costs of reversal.

Levi *v.* Claggett, M. T. 1836. Ex. 5 *D. P. C.* 322; S. C. 1 *M & W.* 547; S. C. 1 *T. & G.* 937.

On motion to reverse an outlawry, it appeared that the party was beyond seas at the time of the exigent being awarded— Where the defendant was beyond seas, reversed on payment of costs*,

The Court adopted the rule in C. P., of reversing the outlawry on payment of costs, and on bail being put in in the alternative.

Porter *v.* O'Meara, T. T. 1839. C. P. 7 *D. P. C.* 657; S. C. 5 *Bing. N. S.* 626.

On a rule to reverse a judgment of outlawry against the defendant, it appeared that the writ of exigent had been awarded on the 18th May, 1837. The defendant swore that, "prior to, and at the time of, and during the proceedings to, outlawry against him by the plaintiff, he resided at Boulogne, in France, out of the jurisdiction of the Court." From counter affidavits it appeared that he was at Epsom on the 25th of May, 1837. without bail†.

Held, that the time of the award of the exigent was alone material, and a fresh affidavit having been produced, in which the defendant positively swore that he was at Boulogne on the 18th May, the Court, without allowing the plaintiff to answer the affidavit, made the rule absolute without bail on payment of costs.

Pigou *v.* Drummond, E. T. 1834. C. P. 4 *Scott*, 573; S. C. 2 *Bing. N. S.* 114.

The defendant, having mortgaged fee-farm rents, had entered into a contract for sale to the mortgagee, pending which the latter died, and the plaintiff, his representative, had proceeded to outlawry against the defendant whilst abroad, but having an agent here to the knowledge of the plaintiff— So, although defendant has an agent here, outlawry will be reversed on terms, with costs.

The Court reversed the outlawry on terms, with costs.

(*e*) Restoration of property after reversal‡.

* But the Court refused, on a motion to reverse outlawry after final judgment, to impose the terms of paying interest from the time of signing final judgment to the period of reversal. (*Ibbotson* v. *Fenton*, T. T. 1836, K. B., 1 N. & P. 779). So, the Court refused to set aside the outlawry without costs, on the ground that a party receiving an annuity for a defendant under a power of attorney, and not being his general attorney, had not been applied to. (*Hunter* v. *Whitfield*, M. T. 1836, C. P., 3 Bing. N. S. 878).

On a writ of error to reverse an outlawry because the defendant was beyond seas, (if it be any answer that he went there for the purpose of avoiding the outlawry), it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry. (*Bryan* v. *Wagstaff*, M. T. 1825, N. P., 2 C. & P. 125; S. C. 1 Ry. & M. 329).

† But the Court will require the affidavit of the defendant himself. (*Gill* v. *Tynte*, M. T. 1839, C. P., 7 Scott, 837).

‡ The sheriff having once seized under a capias utlagatum becomes accountable to the Crown, and, on the reversal of the outlawry, the application to restore must be by amoveas manus in the Exchequer. (*Croft* v. *Lord Percival*, M. T. 1839, C. P., 7 Scott, 847).

XII. RELATIVE TO COSTS.

JENKINS *v.* BIDDULPH, M. T. 1827. C. P. 4 *Bing.* 160.

Upon a joint outlawry the costs of setting aside can only be recovered jointly*.

IN an action against the sheriff for a false return, he having stated that the plaintiffs, the parties named in the writ, were not found in his bailiwick, one being in fact in his custody, upon which the original plaintiff proceeded to outlawry against them.

The Court held, that, being a joint outlawry, they could only recover the costs jointly incurred in setting it aside.

XIII. RELATIVE TO THE REMEDY FOR MALICIOUSLY PROCEEDING TO.

DRUMMOND *v.* PIGOU, E. T. 1834. 2 *Bing. N. S.* 114; S. C. 4 *Scott*, 573.

The fact of the defendant owing the money negatives the want of probable cause.

THE plaintiff being indebted to the defendant, the latter instituted proceedings against him, and when he was abroad continued them to outlawry. The judgment having been reversed in an action against the defendant for suing out such process maliciously and without probable cause—

The Court held, that proof of the existence of a debt was sufficient to negative the charge of want of probable cause, and consequently that the action could not be maintained.

Overseer.

See tits. *Churchwarden—Mandamus—Poor—Session.*

I. RELATIVE TO, WHO ELIGIBLE AS, p. 71.

II. RELATIVE TO THE APPOINTMENT OF, p. 71.

III. RELATIVE TO THE DUTY OF, p. 72.

IV. RELATIVE TO THE RIGHTS OF, p. 72.

V. RELATIVE TO THE LIABILITY OF, p. 73.

VI. RELATIVE TO THE OVERSEER'S ACCOUNTS, p. 75.

VII. RELATIVE TO ACTIONS BY, AND OF THE OVERSEER'S COMPETENCY AS A WITNESS, p. 77.

* A rule to set aside the proceedings in outlawry will be discharged with costs, unless it appears that the application is made by the attorney acting at the instance of the outlaw. (*Houlditch* v. *Swinfen*, M. T. 1835, C. P., 2 Bing. N. S. 712).

I. RELATIVE TO, WHO ELIGIBLE AS.

Ex parte JEFFERIES, H. T. 1829. C. P. 6 *Bing.* 195; S. C. 3 *M. & P.* 450.

Clerk of the treasury of Common Pleas exempt from being.

IN this case the Court held, that the clerk of the treasury of the Court of Common Pleas, being bound to attend personally to the duties of that office, was exempt from serving the office of overseer.

II. RELATIVE TO THE APPOINTMENT OF.

REG. *v.* WORCESTERSHIRE, M. T. 1837. K. B. 3 *N. & P.* 434.

A district having no church cannot appoint overseers*;

A PARISH consisted of six separate districts, five of them having been always distinct chapelries, disconnected with each other, and separately maintaining their own poor; the sixth was also divided into two districts, one parish having no church, but the inhabitants attending the church of St. A., the other district; but P. had a constable, and collected its own church, highway, county, and constable's rates, and A. had two overseers and the vicar's churchwarden; P. elected the other, and had also one overseer; the poor-rates for the two districts, P. and St. A., were separately made and collected, but formed a common fund, and the poor were maintained in a common workhouse in St. A.

The Court held, that B. was not a separate district entitled to the benefit of 43 Eliz., c. 2, and that an appointment of two overseers for it was bad.

REG. *v.* JUSTICES OF WORCESTERSHIRE, H. T. 1840. Q. B. 3 *P. & D.* 465.

but hamlets are entitled to appoint separate overseers.

THE parish of T. contained one hamlet in the county of Warwick, which had always maintained its own poor separately, with separate overseers and surveyors of highways, and three hamlets in the county of Worcester, which had each its own overseer, surveyors of highways and constable, but they maintained their poor jointly. There were two churchwardens for the whole parish, and the parish church was common to and repaired by all four hamlets. After the passing of the 4 & 5 Will. 4, c. 76, the hamlet in Warwickshire and the three hamlets jointly in Worcestershire, were, with other parishes, annexed to a union, and a certain annual quota was assessed on the three latter hamlets jointly. One of these hamlets applied to the Court for a mandamus to appoint separate overseers under 13 & 14 Car. 2, c. 12.

The Court held, that the Warwickshire hamlet could not be con-

* If a private act of Parliament direct, that overseers shall be appointed "for the term of three years then next ensuing," semble, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad. (*Bristol, Governors of Poor*, v. *Wait*, 1835. N. P., 6 C. & P. 591). A local act provided, that the rate-payers of a parish should, "in vestry assembled, or the major part of them then present, nominate" persons to serve the office of overseers of the poor, from whom the county justices were to select the overseers:—Held, that the nomination was not confined to the rate-payers only who were present at the vestry meeting, but that a poll might be granted at which all the rate-payers might vote. (*Reg.* v. *Hedger*, T. T. 1840, Q. B., 4 P. & D. 61).

sidered a reputed parish under 43 Eliz.; and that each of the three hamlets was entitled to have separate overseers under 13 & 14 Car. 2, although the policy of that statute, as to the relief of the poor in small districts, was at variance with the 4 & 5 Will. 4, c. 76.

PINNEY *v.* SLADE, M. T. 1838. C. P. 5 *Bing. N. S.* 319.

The overseer's appointment cannot be questioned in a collateral way.

IN trespass for levying a poor rate under a warrant of distress issued by the defendants as justices, the rate being alleged void, on the ground of the overseers having been unduly and fraudulently appointed at a meeting of borough justices; the jury having negatived the fraud—

The Court refused a new trial; the appointment being a judicial act, and the validity of the appointment questionable on an appeal to the sessions, it could not be questioned in a collateral way.

REX *v.* WITHERLY, M. T. 1828. K. B. 4 *M. & Ry.* 724.

But secondary evidence may be given of the appointment.

THE appointment of overseer for the year 1802 could not be found in the parish chest, and search had been made amongst the papers of B., deceased, who had acted as executor of the party who had acted as overseer for that year.

The Court held, that it was sufficient to let in parol evidence of the contents of that appointment, as being of a single overseer for that year.

III. RELATIVE TO THE DUTY OF.

KING *v.* BURRELL, T. T. 1840. Q. B. 4 *P. & D.* 207.

It is the duty of all the overseers to sign the burgh list.

IN debt for the penalty, under 5 & 6 Will. 4, c. 70, ss. 15, 48—

The Court held, that the neglect by an overseer to sign the burgh list rendered him liable, and that the word "wilful" was not to be imported in section 48; it is the duty of all the overseers to sign the parish list, and if one omits to sign that portion of the list which it is his duty to do, and which is necessary to make the list complete, he is liable; and the fact, that the other overseers have signed particular portions of the list will not excuse him.

ANON., H. T. 1835. K. B. 5 *N. & M.* 12.

But it is not the duty of an overseer to order the vaccination of poor children.

ON motion for a criminal information against an overseer—

The Court said, the duties of an overseer are to provide necessaries and relief for the poor; but he is not bound to take precautionary measures, as to vaccinating poor children, with the view of preventing the small-pox, and a rule for a criminal information refused.

IV. RELATIVE TO THE RIGHTS OF.

WOODCOCK *v.* GIBSON, T. T. 1826. K. B. 4 *B. & C.* 462; S. C. 6 *D. & R.* 524.

With regard to parish lands,

ON pleas in trespass (soil and freehold in the two defendants, being overseers, and one of them the churchwarden), it appeared

that the latter was appointed churchwarden subsequent to the appointment of both as overseers, there being, by custom, but one churchwarden.

they must, under the 59 Geo. 3, c. 12, constitute a body politic.

The Court held, that the premises never vested in them, the 59 Geo. 3, c. 12, vesting parish lands in the churchwardens and overseers as a body politic, but that the defendants, neither before nor after the appointment of the latter, could not, by themselves, constitute a corporation of churchwardens and overseers, within the act, so as to support the pleas of soil and freehold in them.

V. RELATIVE TO THE LIABILITY OF*. See also 4 & 5 *Will.* 4, *c.* 76, *ss.* 46, 95, 96, 97.

Spenceley *v.* Robinson, H. T. 1825. K. B. 3 *B. & C.* 658.

No action lies for penalties under 17 Geo. 3, for refusing inspection of rates, unless the party has sustained an injury.

This was an action of debt for penalties, under 17 Geo. 3, c. 23, s. 2, which enacts, "That overseers of the poor shall permit inhabitants of the parish to inspect rates at all seasonable times; and shall upon demand forthwith give copies of the same to any inhabitant of the parish;" and, by s. 3, "if any overseer shall not permit an inhabitant to inspect the rate, or shall neglect to give copies thereof as aforesaid, such overseer, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l.*"

The Court held, first, that in order to entitle a party to sue for the penalty under the statute, he must shew that he has sustained an injury by the act of the overseer; and, secondly, that there must be a demand to inspect the rate made at a reasonable time and place.

Parker *v.* Edwards, M. T. 1827. K. B. 7 *B. & C.* 594.

But the demand to inspect rates need not be made at the overseer's house.

The overseer, when called upon in order to inspect a rate, was not at home, but at a short distance; and, upon the plaintiff going to him, and demanding it, the overseer refused, but without objecting to its not being made at his house, as the proper place.

The Court held, that such demand was made at a reasonable place, and the action maintainable.

* In action against all the overseers for money lent to one as such:—Held, that, it being contrary to the duty of an overseer to borrow money for parochial purposes, the others, in the absence of any express promise, were not liable. *Massey* v. *Knowles*, 1820, N. P., 3 Stark. 65). An overseer cannot charge the parish with a sum bonâ fide paid by him to other persons for making a poor rate. Nor can he charge a sum so paid for making two divisions of the same. Nor a sum paid for making a copy for collectors. Nor a sum paid to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters. Nor a poundage paid to persons employed in collecting the rates, although it is found at the sessions that the charges are fair and reasonable, and that the overseers require assistance. Nor can a vestry, even though all the rated inhabitants be present, authorize the overseers to charge the parish with such expenses. (*Rex* v. *Gwyer*, M. T., 1834, K. B., 4 N. & M. 158; S. C. 1 A. & E. 216). An overseer who supplies, on his own account, an individual pauper with a coat, is not liable to the penalty imposed by 55 Geo. 3, c. 157, s. 6. (*Henderson* v. *Sherborne*, M. T., 1836, Ex., 2 M. & W. 236).

BENNETT *v.* EDWARDS, M. T. 1827. K. B. 7 *B. & C.* 586; S. C. 1 *M. & Ry.* 482.

In debt for penalties against an assistant-overseer for refusing inspection of rates, his appointment must be shewn, and that it was his duty to allow inspection*.

A PARTY had been appointed an assistant-overseer under 58 & 59 Geo. 3. In an action of debt for penalties under 17 Geo. 2, c. 3, for refusing a parishioner inspection of the rates—

The Court held, that the denial of such a right was sufficient to constitute the parishioner a party aggrieved within the act, and that a refusal, referring the party to the select vestry under whom he acted, he having no right to impose such a qualification, constituted a denial within the act; but that, as the statutes authorizing the appointment of assistant-overseers do not specify their particular duties, but only such powers as the vestry shall confer upon them at the time of their appointment, it was incumbent on the plaintiff to shew that under the assistant-overseer's appointment it was his duty to allow the inspection of the rate.

BENNETT *v.* EDWARDS, E. T. 1828. K. B. 8 *B. & C.* 702.

The declaration against an overseer for refusing inspection of a rate is sufficient, after verdict, if it states that the defendant was overseer, and had such rate in his possession.

IN an action against an assistant-overseer for penalties under 17 Geo. 2, c. 3, for refusing to permit the plaintiff, an inhabitant, to inspect the rate, the declaration alleged that the defendant was such assistant-overseer, and as such had the rate in his possession.

The Court held, that there was sufficient on the record, after verdict, to warrant a judgment for the plaintiff, although it was not expressly alleged that it was the defendant's duty to exhibit the rate, nor was he one of the persons named in the statute; yet the 59 Geo. 3, c. 12, s. 7, authorizing him to act as an overseer, the duties being prescribed in his appointment, and the declaration alleging that he had the rate as assistant-overseer, it must be presumed that such duty was specified in his appointment, and must have been proved; and if it was his duty to keep the rate, the duty of allowing inspection at reasonable times resulted from it.

BATCHELOR *v.* HODGES, H. T. 1836. K. B. 6 *N. & M.* 75.

And the plaintiff need not describe himself as a "rated" inhabitant.

IN an action for penalties on 17 Geo. 2, c. 3, for refusing inspection of the poor rate, the plaintiff described himself as an inhabitant—

The Court held it sufficient, without stating that he was rated; and that charging the defendant as having the rate in his possession as assistant-overseer, without shewing that he was such an assistant-overseer as made it his duty to produce it, was sufficient; at all events, the objection could only be taken on special demurrer; and that it was no answer, that the rate was not a subsisting one, nor an old rate unappealed against, and the time for appeal expired.

BARBER *v.* WAITE, T. T. 1834. K. B. 3 *N. & M.* 611.

The prohibition in the 55 Geo. 3

THE prohibition in the 55 Geo. 3, c. 137, s. 6, against overseers supplying goods, &c., "for the use of any workhouse"—

* The mere omission, whether wilful or not, to sign the burgess list, under 5 & 6 Will. 4, c. 76, s. 15, subjects an overseer to the penalty under sect. 48. (*King* v. *Burrell*, H. T. 1840, Q. B., 4 P. & D. 207; abr., ante, p. 72).

The Court held to mean "for the use of the poor in any workhouse," and that an overseer doing work, and supplying materials for the repairs of the workhouse, was not liable to the penalty.

does not apply to the repairs of a workhouse.

HENDERSON *v.* SHERBORNE, M. T. 1837. Ex. 2 *M. & W.* 237; *supporting* PROCTOR *v.* MAINWARING, M. T. 1831. K. B. 3 *B. & Ad.* 145.

IN debt against overseers for penalties—

Per Cur.—We think the 4 & 5 Will. 4, c. 76, prohibiting a parish officer from supplying goods by way of relief to *any* person in the parish, repeals the penalty under the former act, 55 Geo. 3, c. 137, s. 6; therefore, that an action cannot be maintained under the latter act against an officer for a supply to an individual pauper.

But it seems that the 4 & 5 Will. 4 repeals the 55 Geo. 3 as to officers supplying an individual pauper.

KIRBY *v.* BANNISTER, H. T. 1834. K. B. 3 *N. & M.* 119.

IN an action against five persons acting as overseers for goods supplied to paupers by their joint order, and also for monies advanced—

The Court held, that they were all liable on such orders on which the credit was given, although one in fact was only vestry-clerk and assistant-overseer.

Overseers are liable on their joint order, though one be an assistant-overseer.

EADEN *v.* TITCHMARSH, T. T. 1833. K. B. 3 *N. & M.* 712; S. C. 1 *Ad. & E.* 491.

BY the practice of a parish, the two overseers were always appointed at once, but one of them acted solely for one of the two years, and another for another. The acting overseer for one year ordered coals, which were sent to him and distributed by him among the poor of the parish; the seller debited the parish with them, and afterwards sued both overseers. The acting overseer suffered judgment by default.

The Court held, that, upon these facts, the jury were properly told to consider whether the coals were supplied for the parish by whom they were ordered, and whether credit was given to the acting overseer only, or to both as overseers; and to find for the defendant (the overseer who had not acted) if the plaintiff relied solely upon the reponsibility of the acting overseer, but otherwise for the plaintiff; and the jury having found for the plaintiff, saying that the coals were supplied to the parish, and the overseers were jointly liable as such, the Court refused to disturb the verdict.

But whether one overseer is liable jointly for goods ordered by another is a question for the jury.

VI. RELATIVE TO THE OVERSEER'S ACCOUNTS*.

REX *v.* GWYER, M. T. 1834. K. B. 4 *N. & M.* 158; S. C. 2 *Ad. & E.* 216.

ON motion to quash an order of sessions—

The Court held, an overseer cannot charge the parish with a sum bonâ fide paid by him to other persons for making a poor-rate; nor

Overseers cannot charge the parish money paid in making

* Averment that plaintiff had been appointed and was assistant-overseer; that he had passed certain accounts of him as such overseer, and had verified them on

or collecting the rates;

can he charge a sum so paid for making two divisions of the same; nor a sum paid for making a copy for collectors; nor a sum paid to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters; nor a poundage paid to persons employed in collecting the rates.

REX *v.* JOHNSON, T. T. 1836. K. B. 5 *Ad. & E.* 340.

and an item for defending an appeal against the accounts cannot be allowed.

OVERSEERS' accounts being allowed, and an appeal against them dismissed, the allowance and order of sessions were brought up by certiorari, and an item appeared to be for the expenses of defending an appeal against overseers' accounts.

The Court quashed the allowance and order, such an item being bad on the face of it, inasmuch as no supposable facts could justify it.

REX *v.* JUSTICES OF SOMERSETSHIRE, H. T. 1828. K. B. 7 *B. & C.* 681, n.

The notice of appeal against overseers' accounts need not state the party to be aggrieved*.

A NOTICE of appeal against overseers' accounts, which stated that the party should appeal on the grounds and against the items set forth, specifically stating them and the objection to each—

The Court held sufficient, although it did not state that the party was aggrieved thereby; nor did it in any way appear by the notice that he was so, or was a rated inhabitant of the parish.

REX *v.* JUSTICES OF NORFOLK, M. T. 1832. K. B. 1 *N. & M.* 67; S. C. 4 *B. & Ad.* 238.

The power to convict an overseer by a J. P. for not accounting is discretionary.

ON motion for a mandamus—

The Court held, that the power to commit an overseer for not accounting is discretionary; where the party had never been sworn in, and had only acted in signing the rates, and had by his attorney appeared and satisfied the justices that he had no accounts, the Court refused a mandamus to the justices.

oath:—Held sufficiently proved by evidence that he had acted as assistant-overseer, under a warrant of appointment signed by magistrates, that he had kept the accounts of the parish in a book headed "Overseers' Accounts," and that he had verified those accounts on oath. (*Cannell* v. *Curtis*, T. T. 1835, C. P., 2 Bing. N. S. 228; S. C. 2 Scott, 379).

A warrant of distress against an overseer for not paying over his balance in hand must distinctly set out the summons, the hearing before the magistrate, and the refusal to pay; and if it does not do so, it is bad; and persons granting and executing will be liable to an action of trespass. The form given in some of the editions of Burn's Justice is bad in these respects. (*Harris* v. *Stuart*, 1837, N. P., 7 C. & P. 779).

By 4 & 5 Will. 4, c. 76, s. 47, overseers are to pass accounts quarterly.

* An appeal lies against the accounts of an assistant-overseer. (*Reg.* v. *Watts*, M. T. 1836, K. B., 2 N. & P. 367; S. C. 7 Ad. & E. 461). The next quarter sessions for appealing against an overseer's accounts are the sessions after the accounts have been published and deposited with the parish officer for public inspection. Thus, where the accounts of an overseer were examined and allowed at vestry on April 2, and by two justices on April 3, but were not delivered by the overseer to his successor till May 8:—Held, that the next sessions after May 8 will be the proper sessions to appeal to. It belongs to the justices at sessions to determine the time of appealing against the accounts. Quære, whether an affidavit from an appellant is receivable at the hearing of the appeal, stating the time at which he first had knowledge of the accounts? (*Reg.* v. *Watts*, E. T. 1837, K. B., 2 N. & P. 367).

REGINA *v.* CROSSELEY, E. T. 1839. K. B. 10 *Ad. & E.* 132; S. C. 2 *P. & D.* 319.

An indictment for not accounting must shew an order to account at a time named.

ON an indictment on 4 & 5 Will. 4, c. 76, s. 47, against overseers, for disobedience of an order of the commissioners to account to the auditor of a union—

The Court held, that the counts, not shewing any order for the accounting at the specified periods, were not maintainable, nor counts alleging the neglect to account at the request of the auditor; but that the description of the commissioners by their style of office was sufficient; and also, that their order was sent to the defendants, no personal service being, under sect. 18, necessary.

LEIGH *v.* TAYLOR, M. T. 1827. K. B. 7 *B. & C.* 491.

An overseer's surety is only liable for an act done within the scope of his authority.

IN an action upon a bond against a surety for H., that he should duly account for all such monies, not exceeding £——-, as should come to his hands by virtue of his office as overseer—

The Court held, that as borrowing money formed no part of the duty of an overseer, although applied to parochial purposes, the surety was not liable for monies lent to the overseer and his co-overseer.

VII. RELATIVE TO ACTIONS BY, AND OF THE OVERSEER'S COMPETENCY AS A WITNESS.

DOE *d.* JACKSON *v.* HILEY, E. T. 1830. K. B. 10 *B. & C.* 885.

Ejectment lies by the parish officers, though parish land not for the relief of the poor.

LANDS were vested in trustees for the benefit of a parish church—

The Court held, that the parish officers for the time being might recover possession of them in ejectment, upon a demise in their names, made on the authority of the 59 Geo. 3, c. 22, s. 17, though not for the relief of the poor.

HAINE *v.* DAVEY, H. T. 1837. K. B. 4 *Ad. & E.* 892.

An overseer may shew he is such under the general issue.

UNDER stat. 3 & 4 Will. 4, c. 43, s. 1, (which provides that the contemplated rules of pleading shall not disable any person from pleading the general issue, and giving the special matter in evidence, where by statute he may now do so), an overseer was sued in trespass for taking A.'s goods—

The Court held, that he might still prove, on plea of not guilty, that he, as overseer, distrained the goods for a poor rate due from B., and that they were B.'s. not A.'s. The general issue does not, under the rules of Hil. Term, 2 Will. 4, confine him to proof of his character of overseer.

FLETCHER *v.* GREENWELL, M. T. 1834. Ex. 1 *C., M. & R.* 754; S. C. 5 *Tyrw.* 316.

A director of the poor is a competent witness in an action by overseers*.

BY a local act, the directors and overseers of the poor were enabled to sue and be sued in the name of their clerk, and the inhabitants made competent witnesses.

The Court held, that a director was thereby as competent a witness as any other inhabitant.

* In an action against an overseer defending on behalf of the parish, an inhabitant is not rendered competent for the overseer by the stat. 54 Geo. 3, c. 170. (*Tothill* v. *Hooper*, 1834, N. P., 1 M. & Rob. 392).

REGINA *v.* RECORDER OF BATH, H. T. 1839. Q. B. 1 *P. & D.* 460.

An overseer cannot prove notice of appeal*.

AN overseer was called to prove the notice of appeal.

The Court held, that he was properly rejected, none of the statutes rendering him (a party to the appeal) competent, and there being no distinction as to mere preliminary matters.

Oyer †.

See, also, tits. *Bond—Covenant—Deed—Executor and Administrator—Profert.*

GOODRICKE *v.* TURLEY, M. T. 1835. Ex. 2 *C., M. & R.* 694; S. C. 4 *D. P. C.* 431; S. C. 1 *T. & G.* 146.

After plea, oyer may be obtained‡.

IN this case—

The Court held, that a defendant had not waived his right to demand oyer by having pleaded, and he is only entitled to have it entered of record when made in due time; but that, where the time to plead was extended, without excepting the right to demand oyer, he should have the same time to plead after allowance of oyer as he would have had under the Judge's order.

PAINE *v.* EMERY, T. T. 1835. Ex. 2 *C., M. & R.* 304.—S. P. ALITON *v.* FREESLUN, M. T. 1840. C. P. 2 *M. & G.* 1.

And when set out becomes part of the declaration §.

A DECLARATION in covenant set out the deed according to its legal effect, and the defendant set it out on oyer in hæc verba—

The Court held he could not demur to the declaration on the mere ground of variance, because the deed, as set out on oyer, becomes part of the declaration.

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* In an action by overseers to recover parish lands:—Held, that a rated inhabitant was a competent witness (per *Alderson*, B.). (*Doe* d. *Higgs* v. *Cockell*, 1834, N. P., 6 C. & P. 525, *supporting Oxenden* v. *Palmer*, 2 B. & Ad. 236, *contra Hendebourck* v. *Langston*, and *Rex* v. *Hayman*, 1 M. & Malk. 401, 402).

† By Rule H. T., 2 Will. 4, K. B., C. P., and Ex., it is ordered, that if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer book may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer.

‡ A demand of oyer must minutely describe the parties to the cause. (*Poole* v. *Coates*, M. T. 1836, C. P., 3 Scott, 768). The Court will not permit an inspection of an administration bond at the office of the registrar in Doctors' Commons to be deemed good oyer, although a copy has been accepted by defendant's attorney, and the Ecclesiastical Court has refused to allow the bond to be produced at the office of the defendant's attorney. (*Canterbury, Archbishop of*, v. *Tubb*, E. T. 1837, C. P., 5 D. P. C. 627; S. C. 3 Bing. N. S. 789; S. C. 4 Scott, 543).

§ Where a defendant pleads an indenture, and the plaintiff craves oyer, and then, without setting forth the indenture or the record, replies non est factum, and adds the similiter for the defendant, and delivers the issue with notice of trial,

Palace Court.

See tit. *Attorney*.

HANDLEY *v.* LEVY, M. T. 1828. K. B. 8 *B. & C.* 637.

If an action be commenced in the Palace Court, the Court into which the cause is removed has no jurisdiction as to costs under the 43 Geo. 3, c. 46.

IN this case, the plaintiff, having recovered by verdict a less sum than that for which he had arrested the defendant, had been called upon to shew cause why the defendant should not be allowed his costs under the 43 Geo. 3, c. 46, s. 3. This action was brought in the Palace Court, and was removed hither by the defendant.

Per Cur.—We think the decision of *Costello* v. *Cawley*, (1 B. & P. 81), right. The defendant, too, increases the expense by removing the cause.—Rule discharged.

KNOWLES *v.* LYNCH, T. T. 1834. Ex. 4 *Tyrw.* 477.

A certiorari lies to remove a judgment from the Palace Court with a view to execution.

ON motion for a certiorari—

The Court granted a rule to remove a judgment from the Palace Court, to enable the plaintiff to sue out execution for the residue of the debt, part having been levied by process of the Court below.

Parceners.

DOE *d.* READ *v.* TAYLOR, M. T. 1833. K. B. 2 *N. & M.* 508; S. C. 5 *B. & Ad.* 575.

A fine and feoffment, with livery of seisin, operates as a conveyance*.

ONE coparcener levied a fine, and made a feoffment with livery of seisin—

The Court held, that it operated as a conveyance of her property, and a deforcement of the other coparceners; it appearing also, that, at the time of such livery, a child was left in the house; held that unless it were in any way left there to represent one of the coparceners intended to be ousted, and not a mere inmate of the family of the party, it would not make the livery invalid, even although it were a descendant of one of the coparceners.

the defendant may return the issue, and pray that the deed may be inrolled; and if the plaintiff afterwards proceed to trial upon the issue as originally delivered, it is irregular, and the Court will set aside the verdict. (*Smith* v. *Jennings*, M. T. 1840, B. C., 9 D. P. C. 155).

* Where one of two coparceners alienated her moiety to a stranger in fee, and a deed of partition as executed, and the remaining coparcener conveyed to a stranger, to the use, as to one moiety, of the coparcener in fee, the Court held, that she did not take the moiety as purchaser under the conveyance, so as to let in the heir ex parte paternâ on her death. (*Doe* d. *Crossthwaite* v. *Dixon*, H. T. 1836, K. B., 1 N. & P. 255). One coparcener cannot sue separately for his portion of rents accruing to him and his fellows. An action will not lie, at the suit of one of three coparceners, to recover his proportion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. Semble, that money had and received was not the proper form of action in which to raise the question. (*Decharms* v. *Harwood*, M. T. 1834, 4 M. & Scott, 400; S. C. 10 Bing. 526).

Pardon.

See, also, ante, tit. *Indictment.*

DOE *d.* EVANS *v.* EVANS, T. T. 1826. K. B. 5 *B. & C.* 584; S. C. 8 *D. & R.* 399.

A pardon under 6 Geo. 4, c. 25, restores the felon to his competency to hold lands*.

A COPYHOLDER was attainted of felony, and was pardoned, and the lord had not entered in pursuance of the forfeiture.

The Court held, that the pardon restored the copyholder to his tenement, for which he might maintain ejectment. A pardon under the sign-manual, according to 6 Geo. 4, c. 25, s. 1, has the effect of restoring civil rights so completely, as to prevent the consequence of an inchoate forfeiture not completed effected by entry.

REX *v.* GARSIDE, M. T. 1834. K. B. 4 *N. & M.* 33.

A promise of pardon is no bar to an indictment.

ON a certiorari—

The Court held, the King's proclamation, offering a pardon to accomplices on certain conditions, confers on the party who performs the conditions no legal right to a pardon; so that he cannot plead it either in bar of the indictment or in bar of execution; but the Court will delay execution, in order to enable the party to make application to the Crown for a pardon.

Parent and Child.

See ante, tits. *Habeas Corpus—Infant.*

MORTIMORE *v.* WRIGHT, E. T. 1840. Ex. 6 *M. & W.* 482.

The mere moral obligation is not sufficient to render a father liable for his son's debts†.

THE defendant, on being applied to for a bill for the board of, and for supplies to, his son, who was living separate from his father, and working on his own account, unequivocally referred the plaintiff to the son for payment, adding, that he would become entitled to a sum on attaining full age. The plaintiff had a verdict; but—

The Court directed a nonsuit. A parent is not under any legal obligation to pay his son's debts. A moral obligation *alone* cannot create a *legal* one.

* By 6 Geo. 4, c. 25, pardon on condition of transportation, imprisonment, or other punishment, declared to have the same effect as a pardon under the Great Seal.

† A. had several of his children residing in a house distant from his own, in the charge of B., a servant:—Held, that if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant. (*Cooper* v. *Phillips*, E. T. 1831, N. P., 4 C. & P. 581). To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied either with the assent of the father or by his authority; and the father is the person to judge what is proper for his son. (*Rolfe* v. *Abbott*, M. T. 1833, N. P., 6 C. & P. 286). In an action on the case by a father for an injury done to his son, a minor, in his service:—Held, that the loss of service and expense was the only measure of damages, and not injury to parental feelings. (*Flemington* v. *Smithers*, T. T. 1826, N. P., 2 C. & P. 292.—S. P. *Hall* v. *Hallender*, 4 B. & C. 660; S. C. 7 D. & R. 133).

LAW *v.* WILKINS, T. T. 1836. K. B. 1 *N. & P.* 697.

THE son was in need of clothes, and the father had seen him wearing those furnished by the plaintiff.

A father seeing his son wear clothes is some evidence to go to the jury of a contract to pay.

The Court held, first, that it was some evidence to leave to the jury, and compelled the father to shew that his son was supplied with necessaries; and, secondly, that if a Judge thinks fit to nonsuit, counsel are not bound to insist on the case going to the jury.

URMSTON *v.* NEWCOMEN, E. T. 1836. K. B. 6 *N. & M.* 454; S. C. 4 *Ad. & E.* 899.

THE father of a child, illegitimate in point of law, placed it with its grandmother, the plaintiff, at her request, on the express undertaking given by her, that the father would never be asked a shilling either for her maintenance, clothes, education, or journey; and the child was subsequently delivered to its mother, who was living in adultery, where she was ill-treated, and became at last in a state of helplessness and destitution, and was again taken care of by her grandmother; the father having no notice of the ill-treatment of the child, or of the change of custody from time to time.

But a father who gives up the custody of his illegitimate child is not liable for necessaries*.

The Court held, that the father might reasonably be taken to have supposed that the child remained in the custody of the plaintiff, at whose instance she was delivered over, and that the plaintiff was providing for it at her own expense, so as to rebut any implied promise on his part to pay the plaintiff for the board, maintenance, clothing, and education of his child, even supposing that such an undertaking can be implied at law, by reason of the relationship of father and child.

REX *v.* TOKE, E. T. 1838. Q. B. 3 *N. & P.* 323.

AN order of justices for payment of a weekly sum for the maintenance of a father by the son, describing the application to have been made to the justices of K., by the overseers of the parish of M. in the city of K., to have an order made on T. G., of the parish of M., in the same county, &c., and proceeding to order the said T. G. to pay &c.

A son is bound to maintain his father.

The Court held, that the order sufficiently shewed that T. G. was dwelling within the jurisdiction of the justices; and that, by making their order on the said T. G., the justices had adopted those words, and adjudicated that he dwelt there.

SKINNER, *Ex parte*, M. T. 1824. C. P. 9 *Moore*, 279.

ON motion for a habeas corpus—

It seems courts of common law have not the same jurisdic-

The Court said, we think the courts of law have not in their constitution that species of delegated authority from the king as "parens patriæ," which resides in the Court of Chancery. The Court of

* The Court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shewn to prove that the custody of the father is improper. (*M'Clellan, Ex parte*, T. T. 1831, B. C., 1 D. P. C. 81). A mother cannot legally appoint a testamentary guardian of her natural child, and therefore such a guardian, if appointed, cannot have a habeas corpus to remove such child from the custody to which it was committed by the mother during her lifetime. (*Glover, Ex parte*, M. T. 1835, B. C., 4 D. P. C. 291).

tion as courts of equity over infants*.

Common Pleas, therefore, doubting its jurisdiction, refused upon habeas corpus to interfere to remove a legitimate child of six years old from the custody of the father, who was in gaol, on the ground of his immoral conduct, being separated from his wife and living in adultery, and having obtained the custody of it by fraud and stratagem after it had been placed, by order of the Court, with consent of parents, with a third person, there being no suggestion of ill-treatment by him.

See ante, tit. "Infant."

Parish†.

Parish Certificate. See tit. *Settlement and Removal of the Poor.*

Parish Clerk.

See tit. *Mandamus.*

HARTLEY *v.* COCKE, H. T. 1833. C. P. 9 *Bing.* 728; S. C. 5 *C. & P.* 441.

The union of parishes does not alter the appointment of the clerk.

PREVIOUSLY to the union of two parishes in the city of A. under 22 Car. 2, c. 11, s. 23, the appointment of parish clerk was exercised jointly by the rector and the parishioners.

The Court held, that by the union such custom was not destroyed, so as to give to the rector alone the common-law right of appointment.

Parish Land‡. See tits. *Churchwarden—Ecclesiastical Persons—Ejectment—Overseer.*

Parish Officers. See tits. *Churchwarden—Constable—Overseer.*

Parish Register. See tit. *Marriage.*

* See 2 & 3 Vict. c. 54, ante, vol. 4, p. 269.

† On the question whether a place is parcel of a certain parish, old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs &c. done to a chapel in the parish church, alleged to belong to the place in question, are not evidence. (*Cooke* v. *Bankes*, M. T. 1826, N. P., 2 C. & P. 478).

‡ Where a party has been in possession of a tenement claimed by a parish during a period of twenty years, for the last three of which he has paid rent, and then being expelled under the authority of a magistrate's warrant he is again let into possession by the parish, he is not liable to be expelled by a warrant of two magistrates pursuant to the 33 Geo. 3, c. 12, s. 24. (*Reg.* v. *Justices of Middlesex*, T. T. 1839, B. C., 7 D. P. C. 767).

Parliament. See tits. *Bribery—Commons, House of—Courts—Election—Habeas Corpus—Inquiry, Writ of—Judge—Libel—Process—Requests, Court of.*

Parol Evidence. See tit. *Evidence.*

Particulars of Demand.

See tit. *Set-off*, and particular titles according to the subject-matter.

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X. RELATIVE TO THE COSTS. See div. I., p. 84, n.

I. RELATIVE TO, WHEN IT WILL OR WILL NOT BE GRANTED*.

James *v.* Child, H. T. 1832. Ex. 2 *C. & J.* 252; S. C. 2 *Tyrw.* 302.

On a rule to shew cause why full particulars should not be delivered, it was contended that in all cases, according to the spirit

Since new rules defendant is en-

* By Rule T. T. 1 Will. 4, it is ordered, "That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in inde-

entitled on terms to full particulars, though an account has been delivered.

of the new Rule, full particulars should be delivered, if required by the defendant, whether he had previously had an account rendered or not.

Bayley, B.—It may be that the defendant has had the particulars of the account, and mislaid them. At chambers I have granted such applications as the present, upon the terms of the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial.

BROOKS *v.* FARLAR, M. T. 1836. C. P. 5 *D. P. C.* 361; S. C. 1 *Bing. N. S.* 291; S. C. 3 *Scott*, 654.

But a particular need not be given where the declaration is only on a bill or note*.

A DECLARATION amended upon demurrer was reduced to a single count on a bill of exchange—

The Court held, that the defendant was not entitled to a bill of particulars, though the bill delivered with the declaration before amendment, and which still remained unaltered, alleged, that the sums ought to be recovered, (and which was specified), was only part of the consideration given for the bill of exchange.

bitatus assumpsit, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios." And to secure the delivery of particulars in all such cases, it is further ordered, "That, if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver: and that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the Judge's marshal."

In assumpsit to recover damages sustained by the non-performance of an agreement to assign premises, the Court refused to compel the plaintiff to furnish a particular of the special damage. (*Retallick* v. *Hawkes*, H. T. 1836, Ex., 1 M. & W. 573; S. C. 1 T. & G. 1134). So, in order to obtain particulars in trepass, trover, or on the case, there must be an affidavit stating that defendant does not know what the plaintiff is going for. (*Snelling* v. *Chennells*, E. T. 1836, Ex., 5 D. P. C. 80). And the same rule holds in an action for an escape. (*Davis* v. *Chapman*, M. T. 1837, K. B., 6 Ad. & E. 767).

* If the declaration is on a bill of exchange, and for goods sold, and a particular of demand is obtained under a Judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand. (*Cooper* v. *Amos*, E. T. 1826, N. P., 2 C. & P. 267).

In an action by indorsee against acceptor of two bills of exchange for 500*l.* each, the declaration contained two counts on the bills only. The particulars of demand stated the action to be brought to recover 500*l.*, the amount of the bills set forth in the declaration. The plaintiff had arrested the defendant for 240*l.* only, and the bills were given by the defendant to the drawer as a security for money paid by him for the defendant, and indorsed by the drawer to the plaintiff:—Held, that the defendant was entitled to further and better particulars of the plaintiff's demand, *Alderson*, B., dissentiente. (*Dawes* v. *Anstruther*, T. T. 1837, Ex., 5 D. P. C. 738).

The declaration contained two counts, each on a bill of exchange. The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiff would rely on the whole of any part of the declaration for the recovery thereof:—Held sufficient to entitle the plaintiff to proceed on the second count. (*Hay* v. *Fisher*, M. T. 1837, Ex., 2 M. & W. 722).

PENPRASE *v.* CREASE, H. T. 1836. Ex. 4 *D. P. C.* 711; S. C. 1 *M. & W.* 36; S. C. 1 *T. & G.* 468.—S. P. RANDALL *v.* IKEY, H. T. 1836. Ex. 4 *D. P. C.* 682.

IN an action by an agent against his principal for services— The Court would not compel the latter to give particulars of credits for monies received for him; he is only entitled to ask for what balance the action is brought.

And the Court will not compel a party to give the credits*.

II. RELATIVE TO THE AFFIDAVIT AND RULE FOR †.

III. RELATIVE TO THE FORM OF, AND OF THE RULES OF COURT.

MOSS *v.* SMITH, E. T. 1840. C. P. 8 *D. P. C.* 537; S. C. 1 *Scott, N. S.* 25.

THE declaration contained two distinct breaches, one for not returning, and the other for not taking proper care of goods; the particulars claiming damages only for the non-return.

The Court held, that evidence of injury was properly rejected.

If the particulars omit part of the cause of action evidence cannot be given of it‡.

* The Court refused to compel a defendant to deliver particulars of a plea of payment. (*Phipps* v. *Sothern*, H. T. 1840, Ex., 8 D. P. C. 208). But in another case, upon a plea of payment of a sum in satisfaction of the plaintiff's demand, the defendant was ordered to furnish particulars as in case of set-off. (*Ireland* v. *Thompson*, T. T. 1838, C. P., 6 Scott, 601; S. C. 4 Bing. N. S. 716).

† Where the attorney had, without authority, altered the jurat of the affidavit on which a Judge's order for better particulars had been obtained, the Court set aside the order. (*Finnerly* v. *Smith*, T. T. 1834, C. P., 1 Bing. N. S. 649).

By Rule H. T. 2 Will. 4, a summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if a Judge think fit, without the production of any affidavit.

The Court will not grant a rule to enforce a Judge's order for not delivering a bill of particulars of plaintiff's demand, (*Cane* v. *Spinks*, M. T. 1838, Ex., 7 D. P. C. 27); nor can the defendant sign judgment of non pros. (Vide ante, p. 27).

‡ In an action for work and labour, &c., the particulars stated the action to be brought to recover 77*l.* 4*s.* 11*d.*; "the full particulars exceed three folios and have been already delivered." The former particulars were delivered before action brought, and claimed 77*l.*, the balance of 123*l.*, and acknowledged receipts by cash for 46*l.*:—Held, that this admission was not within the Rule of T. T. 1 Vict., and that payment of the 46*l.* should have been pleaded. (*Bosley* v. *Moore*, E. T. 1840, Ex., 8 D. P. C. 375). Particulars of demand stated the action to be brought to recover the deposit paid upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out for better particulars, which was dismissed upon the plaintiff's attorney stating that the objections were matters of law only. Subsequently a notice was delivered to the defendant's attorney that the objections were set forth in the plaintiff's answer to defendant's bill in Chancery. At the trial it appeared that the only objection was matter of fact. The Court refused a new trial, the defendant's attorney declining to make affidavit that he had been misled. (*Correll* v. *Cattle*, E. T. 1837, Ex., 5 D. P. C. 598).

A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were for commission due to the plaintiff for procuring a charter-party for a vessel called the W., &c.:—Held sufficient. (*Burnett* v. *Bouch*, T. T. 1840, N. P., 9 C. & P. 620).

Before Rule T. T. 1 Vict., (see post, tit. *Payment*), all that was necessary, under Rule Trin. T. 1 Will. 4, was, that the particular should state the balance

IV. RELATIVE TO THE CONSTRUCTION OF*.

V. RELATIVE TO WHERE TWO PARTICULARS ARE DELIVERED†.

VI. RELATIVE TO THE CONSEQUENCES OF MISTAKES IN, AND WANT OF PROOF OF.

MORGAN *v.* HARRIS, E. T. 1832. Ex. 2 *C. & J.* 461; S. C. 1 *D. P. C.* 570.

A variance between particulars a ground for a new trial.

THE particulars annexed to the record varied from those delivered under an order, but which the plaintiff was not in a condition to prove.

The Court refused to nonsuit, but granted a new trial without costs.

HARRISON *v.* WOOD, H. T. 1832. C. P. 8 *Bing.* 372; S. C. 1 *M. & Scott,* 536.—S. P. FLEMING *v.* CRISP, H. T. 1837. Ex. 5 *D. P. C.* 454.

But a variance which cannot mislead‡,

IN this case, the Court held, that a variance in the particulars, which cannot mislead, is not material.

LAMBRITH *v.* ROFF, E. T. 1832. C. P. 8 *Bing.* 411; S. C. 1 *M. & Scott,* 597.

or surprise, is not material.

THE particulars stated the goods to have been delivered to the defendant by the plaintiffs, in their trade of brewers, the goods being spirits; but the defendant, in fact, dealing with one of the plaintiffs and another as brewers.

claimed to be due; and it not specifying sums received on account, although the plaintiff had not complied with the rule, and the cause was referred, the Court refused to interfere as to the costs occasioned by breach of the rule. (*Smith* v. *Elridge*, M. T. 1835, K. B., 5 N. & M. 408; S. C. 4 Ad. & E. 64).

* If to a declaration in the ordinary form in indebitatus assumpsit, with particulars containing various causes of action, the defendant pleads payment into Court, he is not precluded by his plea from contesting his liability in respect of any items beyond the amount paid into Court, as the particulars are not to be considered as part of the declaration. (*Booth* v. *Howard*, H. T. 1836, B. C., 5 D. P. C. 438).

† Where the declaration indorsed to plead in four days was delivered with particulars annexed, which two days after were discovered to have been wrongly intitled, and a fresh one was given:—Held, that the acceptance of the latter was a waiver of the objection, and the plaintiff entitled to sign judgment for want of plea. (*Jones* v. *Fowler*, T. T. 1835, Ex., 4 D. P. C. 232). Where a summons for better particulars had been taken out by one party before a Judge, and as yet not disposed of, the Court refused to entertain an application by the other party to hold the particulars already delivered sufficient. (*Abbott* v. *Hopper*, M. T. 1839, C. P., 8 D. P. C. 19).

‡ Upon a declaration by assignees for money had and received to the bankrupt's use, and an account stated with plaintiffs:—Held, that a variance in the particulars, stating it as received to the use of the plaintiffs, was immaterial, when it did not appear the defendants could be misled by it. (*Tucker* v. *Barow*, M. T., 1827, N. P., 1 M. & M. 137). But where the particular delivered was calculated to mislead the defendant as to the real nature of the demand, and to which he might have pleaded specially, the Court granted a new trial, with liberty to the plaintiff to amend the particulars, and the defendant to plead de novo. (*Stevens* v. *Willingale*, M. T. 1836, N. P., 7 C. & P. 702; 4 Scott, 255).

The Court held, that the defendant having neither been surprised nor misled, the variance was not material.

FISHER *v.* WAINWRIGHT, T. T. 1835. Ex. 1 *M. & W.* 480.

THE first count was on a special promise, that, if the plaintiff would take up a bill of exchange and sue the acceptor, the defendant would pay the costs incurred by the plaintiff. The second count was on the bill itself; and then an account stated. The plaintiff gave a bill of particulars under a Judge's order, claiming the balance of the bill of exchange and interest. To another order, requiring a bill of the costs and expenses mentioned in the first count, the plaintiff delivered a simple bill of costs; and added the amount of the bill and interest.

A particular, though not applicable to a special count, may be used to support an account stated.

The Court held, that the plaintiff, not being entitled to recover the whole of his bill of costs under the first count, was not prevented by his particulars from recovering on the account stated.

MORGAN *v.* HARRIS, E. T. 1831. Ex. 2 *Tyrw.* 385.

THE plaintiff delivered a particular under a Judge's order, and afterwards annexed another to the record, containing items to which, at the trial, the evidence alone applied, but the defendant, not being in a situation to prove the delivery of the first, did not apply for a nonsuit.

If no application to nonsuit, a new trial will be granted, on the ground that the particulars were not proved*.

The Court refused to enter it, but granted a new trial.

VII. RELATIVE TO THE EFFECT OF.

HADLEY *v.* GREEN, H. T. 1831. Ex. 2 *Tyrw.* 390.

THE plaintiff having demands against the defendant for rent, and also the value of stone taken from the premises, brought an action for use and occupation, with the common counts, and delivered particulars for the value of the premises and of the materials taken. A verdict was found generally, but no evidence was offered as to the latter demand. In another action, brought for the same demand—

A demand being mentioned in a particular does not preclude a second action.

The Court held, that the second action was maintainable.

KENYON *v.* WAKES, M. T. 1837. Ex. 6 *D. P. C.* 105; S. C. 2 *M. & W.* 764.

THE plaintiff declared for wages, and put in a particular for wages at 15*s.* per week, amounting to 148*l.*, and gave credit for payment of 70*l.*; and the defendant, at the trial, put the particulars

The particulars may be used as an admis-

* Where the plaintiff failed in proving a delivery of goods within the time mentioned in the particular, but only of a date prior thereto, and the defendant called a witness to disprove the plaintiff's case:—Held, that as the defendant was not misled, the defect of the particulars was not a ground of nonsuit. (*Green* v. *Clark*, E. T. 1833, Ex., 2 D. P. C. 18). It is not necessary to prove the particulars annexed to the record pursuant to the late Rule. (*Macarthy* v. *Smith*, M. T. 1829, C. P., 6 Bing. 145; S. C. 1 M. & Scott, 227).

sion of payment*.

in evidence, and the jury found that the plaintiff was only entitled to 7*s.* a week.

The Court held, that the particulars were properly received as an admission of the payment; and the Court refused to disturb the verdict found for the defendant.

VIII. RELATIVE TO THE NON-DELIVERY OF†.

IX. RELATIVE TO THE AMENDMENT OF, AND PARTICULARS AFTER AMENDMENT OF DECLARATION.

STAPLES *v.* HOLDSWORTH, T. T. 1838. C. P. 6 *Scott*, 605; S. C. 4 *Bing. N. S.* 717; S. C. 6 *D. P. C.* 715.

Where proceedings are suspended for several years, particulars may be amended, except as to the Statute of Limitations‡.

A CONSIDERABLE time had elapsed between the commencement of the suit and the time appointed for trial—

The Court will allow the plaintiff to amend his bill of particulars, provided such amendment does not introduce any new ground of action, which might be met by the Statute of Limitations, more especially where the original ground of action, to meet which the bill of particulars was framed, had been furnished by the defendant himself.

* And by Rule T. T. 1 Vict., such admissions are expressly made evidence. But a particular cannot be used for the purpose of explaining the pleadings in the cause. (*Kilner* v. *Bailey*, 5 M. & W. 382). It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. (*Day* v. *Davies*, H. T. 1832, N. P., 5 C. & P. 340).

† Where the plaintiff, after delivering a bill to the defendant as the attorney of A., by which A. was made debtor, afterwards obtained possession of the bill surreptitiously, and delivered another, making the defendant debtor, the Court stayed the proceedings until a copy of the first bill should be delivered, and directed it to be evidence. (*Edgington* v. *Nixon*, T. T. 1835, C. P., 2 Bing. N. S. 316; S. C. 2 Scott, 507). Rule obtained for particulars operates as a stay of proceedings until delivered; (*Somers* v. *King*, H. T. 1825, K. B., 7 D. & R. 125); and after an order for particulars, and before delivery, a demand of declaration, with notice at the foot of the order being abandoned, held irregular, and judgment of non pros. set aside. (*Wickens* v. *Cox*, T. T. 1838, Ex., 6 D. P. C. 693; S. C. 4 M. & W. 67).

The fact of a plaintiff withholding the particulars of his demand, in disobedience to a Judge's order, is not a ground for discharging a defendant out of custody; (*Graff* v. *Willis*, T. T. 1837, B. C., 5 D. P. C. 715); and where the defendant, after service of the writ of summons, obtained before declaration an order for particulars, and the plaintiff omitted to take any step for three months, the Court refused to compel him to enter a stet processus. (*Kirby* v. *Snowdon*, T. T. 1835, Ex., 4 D. P. C. 191). The non-delivery of particulars with declaration does not preclude plaintiff from signing judgment for want of a plea. (*Jones* v. *Fowler*, T. T. 1833, Ex., 4 D. P. C. 232; see ante, 85, n.).

‡ Where a plaintiff's attorney accidentally gives credit in his particulars for a sum of money, which the defendant sets up as a cross demand, the Court will allow the particulars to be amended on terms. (*Preston* v. *Whitehart*, T. T. 1837, B. C., 5 D. P. C. 720). A declaration in debt, for goods sold, work and labour, and on an account stated, alleged a debt of 100*l.* in each count. The particulars

Particulars of Residence*.

Parties to Actions.

See particular titles according to the subject-matter and form of action.

VALLANCE *v.* SAVAGE, E. T. 1831. C. P. 7 *Bing.* 595.

The party having the legal estate should sue†.

IN an action brought by a trustee against a party for an injury to the reversion—

The Court held, that, having the legal estate, the action was properly brought in his name, although the cestui que trust appeared to have demised the premises and received the rent.

Partition. See tits. *Parceners—Tenants, Joint—Tenants in Common.*

were for 168*l.* for goods sold. Application being made to the Judge before the cause was called on, at the trial he ordered each count to be amended by inserting 200*l.* instead of 100*l.* (*Dew* v. *Katz*, M. T. 1837, N. P., 8 C. & P. 315).

* By 2 Will. 4, *c.* 39, it is enacted, "That every attorney whose name shall be indorsed on any writ, issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court, or any Judge of the same or of any other Court, shall so order and direct, declare in writing within a time to be allowed by such Court or Judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall have appeared to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court, or any Judge of either of the said Courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance."

A plaintiff, being called upon for his place of residence, gave Peele's Coffee-house, Fleet-street:—Held, not sufficient, and proceedings were stayed till he gave a better place of residence. (*Hodgson* v. *Gamble*, M. T. 1834, Ex., 3 D. P. C. 174). And an attorney, who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action if he is bonâ fide unable, after proper inquiry, to give his client's residence. (*Neal* v. *Holden*, H. T. 1835, Ex., 3 D. P. C. 493).

† Where the contract was originally entered into by A., for himself and partner, under the name of "H. & Sons:"—Held, that it was not necessary to join parties who were, by a subsequent agreement, to have a share in the contract. (*Hovill* v. *Stephenson*, M. T. 1830, N. P., 4 C. & P. 469). Two of the electors of a borough went to a banker there, and said they wished to draw cheques upon the bank. The banker promised to honour any cheques they might draw. The cheques drawn were signed by one only, but the account in the banker's books was opened in the joint names:—Held, that they might maintain a joint action against the candidate in whose interest they were, if he adopted the payments made. (*Bremridge* v. *Campbell*, M. T. 1831, N. P., 5 C. & P. 186).

Partners and Partnership.

See tits. *Bankrupt—Money had and received—Mortgage—Property Tax—Pawnbroker.*

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III. OF THE AUTHORITY OF ONE PARTNER TO BIND THE FIRM, AND OF THE RESPONSIBILITY OF PARTNERS FOR EACH OTHER.

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VIII. RELATIVE TO ACTIONS BETWEEN, AND BY AND AGAINST THIRD PERSONS.

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II. OF THE CREATION OF PARTNERSHIPS*.

GREEN *v.* BEESLEY, T. T. 1835. C. P. 2 *Bing. N. S.* 108; S. C. 2 *Scott*, 164.

Any division of profit and loss constitutes a partnership†;

IT was agreed between the plaintiff and defendant that the plaintiff should horse the mail from N. to B. and back again, and be paid at the rate of 9*l.* per mile per annum, to be paid quarterly, provided that the said agreement, on that and every subsequent article, should be properly fulfilled. It was further agreed that the plaintiff should pay for one cart then in use the sum of 18*l.* to the defendant, and that he would pay for, in a fair proportion with the defendant, all repairs of carts, so long as the agreement should be in force. It was also agreed that the monies received for the conveyance of all parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by the loss or damage of any such parcels.

The Court held, that this agreement amounted to a contract of partnership, as profit and loss was to be divided; and therefore, that no action was maintainable at law upon it.

PERRING *v.* HONE, M. T. 1826. C. P. 4 *Bing.* 20.

and entering names as such in a book is sufficient;

AT the time of forming a joint-stock company, the plaintiffs' names were entered in a book as original subscribers, and scrip receipts were issued by the directors, which they afterwards sold before the company's deed was executed, and which was never signed by the plaintiffs.

The Court held, that they must still be deemed partners in the concern, and could not, therefore, recover on a note by the defendant payable to the plaintiffs on account of the company.

FOX *v.* CLINTON, T. T. 1830. C. P. 6 *Bing.* 776.

but mere application for

IN an action against several defendants for goods sold &c., upon a contract, not made with them, but with the chairman and directors

* Where parties enter into a contract of partnership in violation of the law, it is void, and will confer no right on either party as against the other. (*Armstrong* v. *Lewis*, in error, M. T. 1834, Ex., 2 C. & M. 274; S. C. 4 M. & Scott, 1).

† Proof of there having been a person of the same name at S., in Spain, though now residing here, and that there was a firm at S. trading in such name, and no other person there of that name, without further shewing that he ever at all acted in the concerns of the firm:—Held not even to be primâ facie evidence of his being a partner. (*Bargue* v. *De Toutet*, 1820, N. P., 3 Stark. 53). Where two persons are in partnership, the presumption is that they are interested in the partnership stock in equal moieties. (*Farrar* v. *Beswick*, 1836, N. P., 1 M. & Rob. 527).

shares, and payment of first deposit, or secretary entering subscribers' names in a book, does not constitute a partnership;

of a joint-stock company, upon the question, 1st, whether the defendants were, at the time of the contract, partners in the concern; and 2ndly, whether they had held themselves out to the world as such. It appeared that, by the original prospectus for forming the company, it was stipulated that all persons who did not execute the deed of settlement within thirty days after it was ready were to forfeit all interest in the concern. Out of 2,300 persons who paid the first deposit, 1,106 only paid the second, and only 65 signed the deed; and after the time elapsed for paying the second instalment, the directors advertised that such persons as had omitted to pay had forfeited their interest in the concern.

The Court held, 1st, that the mere application for shares and payment of the first deposit did not constitute the parties partners, nor had the directors authority to bind the defendants; and, 2ndly, that the insertion of the names by the secretary in a book containing the list of subscribers could not be deemed an authorized communication to the world, with the assent of the defendants, of their being ostensible persons in an established concern.

BOURNE *v.* FREETH, T. T. 1829. K. B. 9 *B. & C.* 632.

and a party, by merely signing a prospectus, does not render himself liable for goods ordered by others.

IN consequence of a prospectus that a company was to be formed, the defendant having subscribed his name thereto, attended a meeting for the purpose of taking premises, which were afterwards taken, and solicited others to take shares, but he never paid his own subscription.

The Court held, that by signing such prospectus he did not, either by his having actually become a partner, or by holding himself out to the world as a partner, give an implied authority to the person ordering goods of the plaintiff to bind him, and was consequently not liable, as a partner, to pay for them.

ELIGEE *v.* WEBSTER, T. T. 1838. Ex. 5 *M. & W.* 518.

So, a conditional agreement to divide profits in manufacturing a certain invention, does not create a partnership.

BY an agreement in writing, W. agreed with E. to advance him a sum of money for the purpose of manufacturing certain inventions; and it was agreed that if the inventions should become of public or private use W. should be entitled to one-third of the profits of the inventions. The agreement contained an express promise on the part of E. to repay the sums of money advanced by W. In an action brought by W. to recover the money thus advanced—

The Court held, that this agreement did not constitute a partnership between the parties with respect to that sum.

RIDGWAY *v.* PHILIP, M. T. 1834. Ex. 1 *C., M. & R.* 415; S. C. 5 *Tyrw.* 131.

Whether a party be a partner or not is a question for the jury*.

IN an action against several, upon a breach of contract for building an engine made by one in the name of B. & Co., and he, upon being asked what other persons constituted the firm, indorsed the names of the other defendants, and one of the defendants upon

* Plaintiffs, carrying on business as stationers, supplied paper to defendants by order of A., a printer, to whom credit was given. A. afterwards became bankrupt, when it appeared that defendants and A. were jointly interested in the pub-

being applied to if the indorsement by B. was correct, replied that it was; and it appeared that he was present occasionally at the manufactory, inquiring how the engine was going on, but it was proved in fact that he had only a limited interest in the concern:—

Held, that it was a question for the jury, whether his admission and acts were referable to such limited interest or not; and having found that he was not a partner, the Court refused a new trial.

WILLIAMS *v.* JONES, H. T. 1826. K. B. 5 *B. & C.* 108.

AN agreement for taking defendant's son into partnership for ten years as an attorney; the consideration to be paid within two years from the date thereof, but no date was mentioned for the commencement of the partnership.

Where no term is named it will be intended to begin in præsenti.

The Court held, that it must be construed to commence in præsenti; and that parol evidence could not be received to shew that it was intended to be otherwise; and not to take effect until the party had been admitted, in order to render it legal within 22 Geo. 2, c. 46, s. 11.

BATLEY *v.* LEWIS, H. T. 1840. C. P. 1 *Scott, N. S.* 143; S. C. 1 *M. & G.* 155.

TWO parties agreed to enter into partnership by deed, to be executed on a day stated, but it was in fact executed on a later day.

And a partnership commences from the day agreed on, though the deed be executed at a later day.

The Court held, that the one was bound by a contract entered into by the other in the interval between the day fixed and that when actually executed.

HOWELL *v.* BRODIE, T. T. 1839. C. P. 4 *Bing. N. S.* 44; S. C. 8 *Scott*, 372.

VARIOUS negotiations took place with the view of the defendant taking an interest in a building speculation; and he advanced money, and buildings were erected, which a surveyor was to value; and afterwards an agreement was entered into, by which the defendant was to be entitled to one seventh share, expressly to commence from the day of the date thereof.

An agreement to form a partnership after valuation is prospective.

The Court held, that, in the absence of any distinct proposal, the agreement constituted the partnership prospective only, and not retrospective, so as to render the defendant liable for the buildings erected previously thereto.

III. OF THE AUTHORITY OF ONE PARTNER TO BIND THE FIRM, AND OF THE RESPONSIBILITY OF PARTNERS FOR EACH OTHER.

(*a*) IN GENERAL.

DONALDSON *v.* WILLIAMS, H. T. 1833. Ex. 1 *C. & M.* 345.

ONE of two partners, joint-tenants of the house in which the business was carried on, directed a weekly servant to remain there after notice to quit given by the other.

If one partner directs a servant to remain,

lication of a work for which the paper was sold. The jury found that a partnership existed at the time the paper was ordered:—Held, that the defendants were liable. (*Gardiner* v. *Childs*, 1837, N. P., 8 C. & P. 345).

another has no right to expel him*.

The Court held, that he had authority so to do, and that a co-partner could not justify turning the servant out by force.

WALMSLEY *v.* COOPER, M. T. 1839. Q. B. 3 *P. & D.* 149.

But a covenant by one partner not to sue does not bind the firm.

IN an action of covenant by two partners for a joint debt, plea, that Walmsley, one of the plaintiffs, by deed of composition, released defendant from the debt. The replication set out the deed on oyer, which contained no release in terms, but a covenant by the said plaintiff not to sue for any debt due from defendant to him.

Per Cur.—There is no answer to this action. If one of two plaintiffs covenant not to sue for a joint debt, he may be liable for a breach of that covenant, if both afterwards sue; but if he is then sued by the debtor for breach of covenant, he alone must answer for it; the two will have recovered according to defendant's obligation to them, but that one only will be compellable to refund who has entered into a counter obligation with their debtor not to sue him.

SMITH *v.* CRAVEN, T. T. 1831. Ex. 1 *C. & J.* 500; S. C. 1 *Tyrw.* 389.

So, upon joint speculation, not a general partnership, advances to one member do not bind another.

A., B., and C., not general partners, entered into a joint speculation, it being agreed that each should contribute one-third; and they employed an agent to purchase, who consigned the goods to A., on whom he drew bills, which were accepted, payable at the plaintiffs', his bankers, and were all duly honoured on the credit of A. C. regularly paid his proportion to A. and B., who managed the speculation, being ignorant whence they obtained funds to meet their share, nor did the bankers know any thing of the joint speculation.

The Court held, that upon the bankruptcy of A. and B. they could not sue C., in respect of the advances so made on the credit of A., although applied in payment of the bills drawn on account of the joint concern.

KIRWAN *v.* KIRWAN, E. T. 1834. Ex. 4 *Tyrw.* 491.

And one partner agreeing to pay does not exonerate another without notice assented to.

C., M., and N., who carried on business under the name of J. K. & Sons, being indebted to A., C. retired from the partnership, and M. and N. agreed to liquidate the claims. Afterwards M. also retired, and advertisements of the dissolutions of both partnerships were at the same time inserted in the Gazette. N. then took in a new partner, and the business was carried on in the original name of J. K. & Sons. A.'s account was transferred to the new firm, and he received accounts and payments from them; but it did not appear that he ever saw the Gazette, or that either he or the new partner consented to the substitution of the responsibility of the new firm.

* Where it was clearly established that there was a joint interest between the printer and publisher in particular works, for which paper was furnished by the plaintiffs, and delivered to the printer by orders from the publisher, who afterwards became bankrupt:—Held, that if the jury were satisfied, when the goods were furnished, the defendants were partners in the concern for whose benefit they were furnished, the plaintiffs were entitled to recover, otherwise not. (*Gardiner* v. *Childs*, M. T. 1837, N. P., 8 C. & P. 345).

The Court held, that the retired partners were not released from their liability. It is necessary that both the creditor and the new member introduced into the firm should have consented to the transfer of the debt.

(*b*) In particular.

1. *Arbitration, Submission to.* See also, ante, tit. *Arbitration.*

Stead *v.* Salt, E. T. 1825. C. P. 3 *Bing.* 101.

A submission to arbitration was signed only by three out of five partners— One partner cannot bind his co-partners by submission to arbitration,

The Court held, that it did not bind the partnership, although the subject-matter arose out of partnership particulars, it being no part of the implied authority or business of a trading firm.

See 2 *Mod. Rep.* 228; *Com. Dig. Arb. D.* 2.

Adams *v.* Bankart, H. T. 1835. Ex. 1 *C., M. & R.* 681.—S. P. Boyd *v.* Emmerson, M. T. 1834. K. B. 4 *N. & M.* 99; S. C. 2 *A. & E.* 184.

Partnership accounts were submitted to arbitration by parol, and the arbitrator made an award. without his consent.

The Court held, that the sum so awarded was not evidence on the account stated, the submission not being proved to be by all the partners, or with their consent.

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2. *By Bills and Notes.*

Thicknesse *v.* Bromilow, E. T. 1832. Ex. 2 *C. & J.* 425.

In an action on a bill of exchange, it appeared that one of the partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership firm, and the money was afterwards applied to the partnership purposes. One partner who raises money for the firm renders his co-partner liable*.

The Court held, that the other partner was liable to the persons from whom the money was so obtained.

Wintle *v.* Crowther, H. T. 1831. Ex. 1 *C. & J.* 316; S. C. 1 *Tyrw.* 216.

In an action on a bill of exchange— So, a partner, by bill, can

The Court held, that where a partner, by an acceptance, pledges

* But, where one partner borrows money on his own private credit, though he afterwards apply it to partnership purposes, semble the lender cannot charge the partnership with the liability of the single partner. (*Lloyd* v. *Freshfield*, T. T. 1826, N. P., 9 D. & R. 19; S. C. 2 C. & P. 325).

Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk, in this form:—"For agents of the R. V. B.—J. G." It was held to be no answer to a joint action against them by the indorsee of such a bill, to shew that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. (*Sanderson* v. *Brooksbank*, H. T. 1830, N. P., 4 C. & P. 286).

pledge the name of the firm whether dormant partner or not*.

the partnership name, of whomsoever it may consist, and whether the partner be named or not, and whether known or secret partners, the partnership will be bound, unless the title of the party seeking to charge them can be impeached; but, where the partnership acceptance was only in part pledged to satisfy the private debt of such partner, with the knowledge of the taker as to such part only being his separate debt—

Held, that the secret partner was liable as to so much as was not, to the knowledge of the taker, applied in fraud of the partnership.

South Carolina Bank *v.* Case, T. T. 1828. K. B. 8 *B. & C.* 427.

An indorsement of a bill by one partner may bind the firm.

One partner of a firm in England proceeded to a foreign country for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the name of the firm should appear as little as possible on paper, and that no greater sum than £— should be risked in partnership speculations; he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in England subsequently sanctioning them; and the transaction being for the benefit of the partnership—

The Court held, that such indorsements were to be deemed the indorsements of the firm, in the name used by them for the purposes of the foreign business.

Faith *v.* Richmond, H. T. 1840. Q. B. 3 *P. & D.* 187.

Whether one partner in a coal company, who makes a note in the name of a firm, binds his co-partners, is a question for the jury.

In assumpsit upon a note payable "at the London and Westminster Bank, 9 Waterloo Place," and signed "for the Newcastle Coal Company, William Richmond, manager," to which the plea was, that the defendants did not make the note; it appeared that the usual style of the defendants' firm was "The Newcastle and Sunderland Wall's End Coal Company," and that they kept no account at the London and Westminster Bank, in Waterloo Place; Richmond was a partner in the firm, and had authority to sign notes in the name of the firm.

The Court held it was properly left to the jury to say, whether this signature substantially designated the firm, and whether Richmond had authority to make it.

Jones *v.* Yates, E. T. 1829. K. B. 9 *B. & C.* 532.

If one member of a firm pays away partnership bills for a private debt, the firm cannot maintain trover for the bills.

S., in partnership with B. and also with Y. and Y., indorsed over to the latter firm bills belonging to the former, without the knowledge of B., in discharge of his private debt, and afterwards indorsed them over to a creditor of that firm upon the dissolution of the firm of S. and B.

The Court held, that S. and B. could neither maintain trover against Y. and Y. for such bills, nor assumpsit for the monies paid

* And a retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name after a dissolution of partnership. (*Smith* v. *Winter*, T. T. 1834, K. B., 4 M. & W. 454).

by S. out of the partnership monies to Y. and Y. in discharge of his private debt; neither could the assignees of S. and B. (become bankrupts) maintain such actions.

VERE *v.* ASHBY, M. T. 1829. K. B. 10 *B. & C.* 288.

A new partner is not liable on a bill for a debt before he became partner.

THE defendant, by an agreement for a partnership with A. and B. on the 24th of June, agreed that he was to be considered a partner from the 18th of May previously, but that his name should not appear, and he continued a partner until the 21st of September following. The plaintiffs, who before and after the agreement had been the bankers of the firm, discounted one bill for them on the 21st May, and two others on the 13th July, and placed the amount to the partnership account, but were ignorant of the defendant being a partner until the winding up of the account.

The Court held, that the defendant was not liable on the first, when he was not in fact a partner nor his credit pledged, but that he was for the latter.

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3. *Payments to.*

PORTER *v.* TAYLOR, E. T. 1817. K. B. 6 *M. & Selw.* 156.

A payment to one partner, though the firm have authorized an agent to receive the debt, is good *.

IT had been agreed between two partners that a third person should collect and pay the debts, of which the defendant had notice, and promised to pay at a future time, but before that paid it to one of the partners:—Held that such agreement amounting only to an authority to such agent to receive, and to make his receipt of the debt paid to him a good discharge, it did not restrain the rights of the partners, and the payment to one therefore was good.

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4. *With respect to Frauds* †.

* A clerk in a house lent money to the partnership composing it; two of them signed an acknowledgment for it, agreeing to pay 5*l.* per cent. interest. Various changes took place in the house, in the course of which one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms till the last became bankrupt. The clerk continued to serve all the different firms, and was cognisant of the different changes:—Held, that he might notwithstanding recover the money he had advanced from the two persons who signed the acknowledgment. (*Blew* v. *Wyatt*, T. T. 1832, N. P., 5 C. & P. 397).

Where a receipt was given by one of several partners, without the knowledge of the others, in an action to recover the partnership debt—Held, that evidence was admissible to shew that the receipt was fraudulently given by a co-plaintiff; in all cases a receipt is only primâ facie evidence, which admits of explanation. (*Farrar* v. *Hutchinson*, T. T. 1833, K. B., 9 Ad. & E. 641; S. C. 1 P. & D. 437; abr., post, tit. *Receipt*).

† A partnership cannot acquire property in goods obtained by the fraud of one partner, although the others are not privy to it. (*Kilby* v. *Wilson*, M. T. 1825, N. P., 1 Ry. & M. 178).

One F., a partner in the plaintiff's house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be

5. With respect to Torts.*

IV. RELATIVE TO THE SALE OF A PARTNER'S SHARE.

M'Niell *v.* Reid, M. T. 1832. C. P. 9 *Bing.* 68.

A partner who sells part of his share cannot afterwards object, that he could not do so without the consent of the rest.

The defendant, being in partnership with others, agreed to take the plaintiff into the concern, and give him part of the defendant's share, in consideration of his giving up a valuable appointment, which he did.

The Court held, first, that it was not an objection lying in the defendant's mouth, that the plaintiff could not be received into the partnership without the consent of the rest; and secondly, that the consent to become a partner was a sufficient consideration for such an agreement.

V. RELATIVE TO THE RIGHT OF ONE PARTNER TO TRANSFER A CONTRACT TO A CO-PARTNER.

Robson *v.* Drummond, E. T. 1831. K. B. 2 *B. & Ad.* 303.

One partner cannot transfer a contract to bind a third party to a co-partner.

A person made a contract with one partner alone, not knowing of the other; it was to be a continuing contract for the hire of a carriage. The partnership was afterwards dissolved, and the partner with whom the contract was made left the business, which was continued by the other.

The Court held, that the person making the contract was not bound to continue it with the other partner.

VI. RELATIVE TO BOTTOMRY AND RESPONDENTIA BONDS BY PARTNERS†.

mixed with the money of the firm; F. having been convicted of another forgery committed under similar circumstances, and executed:—Held, that the defendant might recover the amount in an action against the surviving partners for money had and received to their use. (*Marsh* v. *Keating*, H. T. 1835, C. P., 1 Scott, 5; abr., ante, tit. *Money had and received*).

* Semble, the rule that there is no contribution amongst tort-feasors does not apply where they are so by mere inference of law, but is confined to cases where they must be presumed to be cognisant of the wrongful act. (*Pearson* v. *Shelton*, T. T. 1836, Ex., 1 M. & W. 504; S. C. 1 T. & G. 848).

† The statute 69 Geo. 1, c. 18, s. 12, did not extend to prevent partners from lending money on respondentia. (*Gore* v. *Wynne*, T. T. 1829, N. P., 1 M. & M. 393).

VII. RELATIVE TO DORMANT AND ACTING PARTNERS.

BECKHAM *v.* KNIGHT, H. T. 1838. C. P. 4 *Bing. N. S.* 243; S. C. 5 *Scott*, 419; S. C. 2 *Scott, N. S.* 675; S. C. 1 *M. & G.* 758.

A servant cannot sue a dormant partner.

IN an action on a written agreement between W. M. K. and J. S., type founders &c. and co-partners, of the one part, and the plaintiff of the other part, whereby the plaintiff covenanted and agreed with W. M. K. and J. S., and the survivor of them, to serve K. and S., and the survivor of them, for the term of seven years, as their foreman, in the management and carrying on of their trades; and K. and S. covenanted and agreed with the plaintiff, that they, and the survivor of them, would employ the plaintiff in such capacity during the term.

The Court held, that a plea by a dormant partner, sued jointly with W. M. K., that at the time of the agreement he was a secret partner; that the plaintiff did not know he was a partner in the firm, and contracted with K. and S. alone on their credit, and not with the defendant, or on his credit; and that there never had been any consent or agreement with the plaintiff for his services, other than the agreement set out; traversing the promise in manner and form, &c., was good, on demurrer.

DAVID *v.* ELLICE, H. T. 1826. K. B. 5 *B. & C.* 196.

But a mere notice and transfer of the debt of a retiring partner does not absolve him from liability*.

ON the retirement of the defendant from the firm, notice was given to the plaintiff, a creditor of the firm, of the remaining partners continuing the business, and charging themselves with the debts, and the plaintiff's balance was transferred with his assent to the new account, and he drew bills upon them, which were paid, to a considerable amount.

The Court held, that as the plaintiff acquired no new security, and in the absence of any proof that the retiring partner left funds in the hands of his former partners which he could otherwise have withdrawn, he was not discharged.

CARTER *v.* WHALLEY, T. T. 1830. K. B. 1 *B. & Ad.* 11.

Unless a party publicly repre-

A BILL was drawn upon partners by the name of the P. & M. Company, and accepted by procuration for the Company; it appearing

* If a debtor who is a partner in a firm leaves that firm, and any person trading with the firm has notice of it, and goes on trading with the firm, and making fresh contracts, the retiring partner is not liable, though no new partner joins the firm. (*Hart* v. *Alexander*, H. T. 1837, N. P., 7 C. & P. 746; S. C. 2 M. & W. 484). But where a retired partner permitted his name to remain on the cart and over the house of business:—Held, that he was responsible for the negligence of the driver. (*Stables* v. *Eley*, H. T. 1825, N. P., 1 C. & P. 614).

An indorsee of a bill of exchange cannot recover against acceptors of a bill accepted by one who was formerly a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as, if he allowed his name to remain on the door of the house of business, or the like. If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for the defendants; but a conversation between the witness and one of the defendants, in which he so stated, is clearly not so. (*Dolman* v. *Orchard*, M. T. 1825, N. P., 2 C. & P. 104).

sents himself as a partner, notice of withdrawal need not be given.

that one of the defendants, originally a partner, had withdrawn from the concern before the acceptance given.

The Court held, that the defendant, not having represented himself to the plaintiff, nor having ever appeared publicly as a partner, nor the plaintiff having ever dealt with him as such, no notice of his withdrawing himself was necessary.

ARMITAGE *v.* WINTERBOTTOM, E. T. 1839. C. P. 1 *Scott, N. S.* 23; S. C. 1 *M. & G.* 130.

One partner, by insuring after dissolution and recovering the amount, does not render his co-partner liable.

ONE of several partners, after the dissolution, effected a policy of insurance on goods in premises of the plaintiff, and received the amount of loss.

The Court held, that, it not having been effected by any authority, or in pursuance of any duty towards the partnership, the receipt of the money by him could not render the former partners liable in any implied contract to indemnify the landlord, or as for money received to his use.

VIII. RELATIVE TO ACTIONS BETWEEN, AND BY AND AGAINST THIRD PERSONS.

(*a*) BETWEEN PARTNERS.

WRAY *v.* MILESTONE, E. T. 1839. Ex. 5 *M. & W.* 21.

One partner may sue his co-partner for the balance of an account stated;

THE plaintiff and defendant had been engaged as partners in particular purchases and sales of wool, and, having had mutual dealings, stated an account, containing, amongst other items, "loss of wool;" and the plaintiff having a balance against the defendant, which he signed and admitted to be due from him—

The Court held this sufficient evidence of a promise to pay it; and that the plaintiff might sue for the amount of that item, and that a subsequent assent by him to take out the balance in meat, being merely matter of accommodation, did not preclude him.

JACKSON *v.* STOPHERD, H. T. 1834. Ex. 2 *C. & M.* 361; S. C. 4 *Tyrw.* 330.

as, where partners dissolve and a valuation takes place.

AT the termination of a partnership in a coal mine, but before the accounts were finally balanced, the plaintiff and the defendant agreed to divide the utensils and materials, each taking one half in value, article by article, according to a valuation to be made, and after the valuation, as the defendant was about to work another coal-mine, it was agreed that he should have the whole at the value fixed. He accordingly took possession thereof.

The Court held, that the plaintiff had an immediate right of action for a moiety of the value of the materials and utensils.

SADLER *v.* HICKSON, H. T. 1834. K. B. 3 *N. & M.* 258; S. C. 5 *B. & Ad.* 936.

But one partner taken in execution cannot sue his co-

A. RECOVERED against B., C., and D., partners in trade, upon their joint contract, and took B. in execution only, who thereupon paid the whole sum recovered. B. brought an action against his co-defendants for contribution—

The Court held his remedy was in equity, as in cases of a voluntary payment by one partner of a debt due from himself and his co-partners upon their joint contract.

partner for contribution.

BROWN *v.* TAPSCOTT, E. T. 1840. Ex. 5 *M. & W.* 119.

THE plaintiff and defendant, together with others, entered into and signed the following special contract:—"Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter, by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the Brocklebank, or any other suitable vessel for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account; each of us taking a proportionate interest in this enterprise according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid 10*l.* per cent. on the amount of our subscriptions; and we hereby bind ourselves, and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earning of the boat not be sufficient to pay the expenses; it being, however, understood, that our liability is not to extend beyond the amount subscribed by us respectively."

Nor can one partner sue his co-partners (shareholders) for money paid, being the value of the share of the latter.

The Court held, that this agreement constituted a partnership between the parties who signed, and that the plaintiff, who had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid against the defendant, who had not paid up his subscription; but that the proper form of action was a special action of assumpsit for the non-performance of the undertaking, to pay the plaintiff the instalments from time to time.

HODGES *v.* GRAY, H. T. 1836. Ex. 4 *D. P. C.* 733; S. C. 1 *T. & G.* 246.

DECLARATION on a covenant between the plaintiff and defendant, co-partners, that the business should be carried on in the house of the latter. Breach, that he would not permit it to be carried on there, but improperly closed the premises and prevented customers having access.

Declaration, to carry on business on premises, breach that the defendant closed the premises, must state at improper times.

The Court held the declaration insufficient, without going on to allege at proper and seasonable times.

PAYNE *v.* HALES, M. T. 1839. Ex. 7 *D. P. C.* 859; S. C. 5 *M. & W.* 598.—S. P. WORRALL *v.* GRAYSON, H. T. 1836. Ex. 1 *M. & W.* 166; S. C. 4 *D. P. C.* 718.

PLEA, in debt for goods sold, that they were sold by plaintiff as agent for W., and that the plaintiff and defendant were partners, and the goods purchased as partnership stock.

Plea, that plaintiff and defendant were partners, is bad*.

* Accounts kept by a clerk, who was the agent of all the parties, are receivable in evidence without his being called as a witness. (*Brierly* v. *Cripps*, M. T. 1836, N. P., 7 C. & P. 709).

The Court held the plea bad, as amounting to the general issue that the defendant was never indebted to the plaintiff.

(*b*) By partners against third persons*.

Story *v.* Richardson, M. T. 1839. C. P. 6 *Bing. N. S.* 123; S. C. 8 *Scott*, 291.

One of several partners may sue an agent who erroneously makes out the partnership and private accounts†.

The plaintiff and his co-partners employed the defendants as accountants to make out the accounts of the firm, and also the separate balance of each partner, which were so erroneously made out that the plaintiff individually suffered a considerable loss.

The Court held, that he might maintain the action alone, and that the allegation that he had retained the defendants was not a variance.

Cothay *v.* Fennell, E. T. 1830. K. B. 10 *B. & C.* 671.

Where three firms agree to purchase jointly they may join in the action for breach of contract.

Three firms agreed to be jointly interested in a purchase to be made by one of them. That one accordingly made the contract, and that one alone was known to the vendor in the transaction; but, in an action against the vendor—

The Court held, that the three might join as plaintiffs.

Kell *v.* Nainby, M. T. 1829. K. B. 10 *B. & C.* 20.

A person whose name nominally appears need not be joined.

A person who held himself out to the world as a partner, and who appeared to the defendant, and was believed by him to be a partner with the plaintiff, but in fact was not really a partner.

The Court held, that the not joining him as a plaintiff in the action was no objection to the plaintiff's recovering, although he might be liable to all the responsibility of being a partner.

Ratcliffe *v.* Bleasby, T. T. 1825. C. P. 3 *Bing.* 148.

A partner suing a co-partner is entitled to a copy of draft agreement to declare on.

The plaintiff had signed a draft agreement of articles of partnership, and afterwards refused to execute the engrossed copy, which was in some respects different.

Held, that, as the defendant could not be deemed a trustee as holding the latter instrument for the plaintiff, it is not within the principle on which the Court would grant inspection to enable the plaintiff to declare, but, as to the draft agreement on which both parties had an interest, the rule was granted.

See 4 *Taunt.* 157—159.

Debenham *v.* Chambers, M. T. 1837. Ex. 6 *D. P. C.* 101; S. C. 2 *M. & W.* 128.

In a declaration by sur-

In an action by surviving partners, the declaration stated the defendant to be indebted to the plaintiffs and their deceased partner on

* Persons trading abroad, so as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue at the place of trading by reason of the particular law of that country. (*Shaw* v. *Harvey*, T. T. 1230, N. P., 1 M. & M. 526).

† Where a party colludes with one partner of a firm to enable him to defraud the other partners, the former may maintain a joint action in respect of such tort. (*Longman* v. *Pole*, T. T. 1828, N. P., 1 M. & M. 223).

an account then stated between them, and, after alleging a promise to all, assigned as a breach that the defendant had not paid.

The Court held the ordinary breach sufficient.

viving partners the general breach is sufficient.

WALLACE *v.* KELSALL, M. T. 1840. Ex. 8 *D. P. C.* 841; S. C. 7 *M. & W.* 264.

IN an action by three plaintiffs on a joint demand, plea of accord and satisfaction with one, by part payment and set-off due from him to the defendant.

The Court held the plea good, without going on to allege that it was with the authority of his co-plaintiffs.

Accord and satisfaction with one partner may be pleaded*.

(*c*) BY THIRD PERSONS AGAINST PARTNERS.

COFFEE *v.* BRIAN, E. T. 1825. C. P. 3 *Bing.* 54.

A., B., AND C. were jointly concerned in the Irish butter trade, and A. consigned butters to B., who sold them, and C. accepted bills drawn by A., and the profits were afterwards divided. C. having expressed a reluctance to accept in his own name without some security, B. engaged to provide for the bills out of the proceeds already received.

The Court held, that C. having accepted and paid the bills might recover on the common counts; as soon as the bills were paid, the money in C.'s hands was to be deemed separated from the partnership account.

An action lies against one partner by another for money separated from the partnership account.

RIDGWAY *v.* PHILIP, M. T. 1834. Ex. 1 *C., M. & R.* 415; S. C. 3 *D. P. C.* 154; S. C. 5 *Tyrw.* 131.

THIS was an action of assumpsit for a breach of contract in erecting a draining engine on some lands, the fens in Cambridgeshire, which had wholly failed. Plea, by the defendants separately, the general issue.

The Court held, where the defendants sever in their plea in as-

Partners may defend separately, and their counsel cross-examine and address the

* F. and B., attornies, sued the defendants for work and labour; the defendants pleaded a set-off for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, although F. had, after the commencement of the partnership, admitted the receipt of the money. (*France* v. *White*, M. T. 1839, C. P., 8 D. P. C. 53; S. C. 6 Bing. N. S. 33; S. C. 8 Scott, 257).

In an action by two plaintiffs for work, &c. as attornies, who carried on the business as partners:—Held, that the defendant could not object, that by a contract inter &c., one was to be secured a certain part of the profits at all events, the debts in the first instance being the joint property of both. (*Bond* v. *Pittard*, T. T. 1838, Ex., 3 M. & W. 357).

An agreement for letting premises (under hand only) was signed "H. Curtis & Co.;" and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed:—Held, upon evidence that both persons acted in the business, that there was sufficient proof of an execution by the partnership. (*Evans* v. *Curtis*, T. T. 1826, N. P., 2 C. & P. 296).

jury accordingly*.

sumpsit, and appear at the trial by separate counsel, they may cross-examine the witnesses, and address the jury separately.

WILSON *v.* BAILEY, M. T. 1840. C. P. 9 *D. P. C.* 18; S. C. 2 *Scott, N. S.* 115; S. C. 2 *M. & G.* 797.

Plea, that the bill was given for a debt before the partnership, replication de injuriâ of partly before and partly after, plaintiff must have judgment.

IN an action by A., the drawer and payee of a bill of exchange, against B., C., and D. as partners, D. pleaded that B. and C., without D.'s authority or consent, accepted the bill in respect of a debt contracted by B. and C. before the partnership, and not in respect of a debt relating to the partnership. Upon the replication de injuriâ to the plea, and issue found for the plaintiff, as it appeared that the consideration of the bill was a debt which arose partly before and partly after the commencement of the partnership—

The Court refused to interfere.

RUPPELL *v.* ROBERTS, M. T. 1834. K. B. 4 *N. & M.* 31.

To render partners liable, a joint liability may be shewn, though goods be ordered by one only.

IN an action by C. against A. and B. for the price of goods, it appeared that A., at the suggestion of B., by letter orders a cargo of timber of C. The invoice was made out in the name of A., and a bill of exchange was drawn by B. on A. for the amount of the freight, which was paid by A.

The Court held, it was competent to C. to shew that A. and B. were jointly interested in the purchase.

(*d*) WITNESSES CONNECTED WITH.

BARKER *v.* STUBBS, H. T. 1839. C. P. 1 *M. & G.* 45; S. C. 1 *Scott, N. S.* 131.

A partner who has no interest in the trade is

THE business was carried on in the name of the father and the son, and bills and receipts given in their joint names.

The Court held, that the former was not precluded from shewing

* A deposit of private deeds by one partner, made under a written agreement to secure payments made for him, will cover payments made on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts. (*Chuck* v. *Freer*, M. T. 1828, N. P., 1 M. & M. 259; S. C. contrà, 2 G. & J., B. C., 246).

Where there are four defendants, three of whom have suffered judgment by default, the three may be required by subpœna to produce a deed of partnership under which all four were acting with the plaintiff in the matters which gave rise to the action, but the Court will not make an order requiring them to produce the deed. (*Colley* v. *Smith*, H. T. 1838, C. P., 6 D. P. C. 399; S. C. 4 Bing. N. S. 285; S. C. 5 Scott, 700).

A. sued B., C., and D. in a joint action, B. pleaded never indebted, and C. and D. suffered judgment by default:—Held, that, to render B. liable, the jury must be satisfied there was a joint contract between A. and B., C., and D. (*Robeson* v. *Ganderton*, 1840, N. P., 9 C. & P. 476).

If a writ of fi. fa. be sued out against one of several partners for a debt due from him alone, there is a great doubt as to what interest in the partnership property can be sold by the sheriff. (*Burton* v. *Green*, H. T. 1828, N. P., 3 C. & P. 306).

that the son had no interest in the trade; the son was a competent witness in an action by the father for goods sold.

a competent witness*.

WILSON *v.* HIRST, E. T. 1833. K. B. 1 *N. & M.* 742; S. C. 4 *B. & Ad.* 760.

ON a question as to the amount of interest to be allowed by bankers to their client, the former called a retired partner to prove the course of dealing.

A released partner is a competent witness†.

The Court held, that mutual releases having been executed of all demands, and of his claim to any surplus having an existence at the time of such release, he was a competent witness.

AFFALO *v.* FOURDRINIER, M. T. 1829. C. P. 6 *Bing.* 306.

TWO partners being sued on a bill as indorsees, one pleaded his discharge by bankruptcy and certificate, and a non pros. was entered as to him.

So, a certificated bankrupt partner is a competent witness;

The Court held, that as, since the 49 Geo. 3, c. 121, s. 8, the solvent partner, after payment of the partnership debt, might prove against his insolvent partner's estate, and the certificate being a bar to any action for contribution, the bankrupt was an admissible witness for him.

HALL *v.* RIX, E. T. 1829. C. P. 6 *Bing.* 131; S. C. 3 *M. & P.* 273.

A PARTY admits himself to be a co-contractor—

but a co-partner is not a witness for the defendant.

The Court held him to be inadmissible for the defendant; for although it might be against his interest to admit such liability in respect of contribution, yet he has a more immediate interest to defeat the action, or reduce the damages.

HATCHER *v.* SEATON, E. T. 1837. Ex. 2 *M. & W.* 47.

A., ONE of two partners, on entering the partnership borrowed a sum of C., and gave her his note, which, after the dissolution, was indorsed to B., the continuing partner, and by him set off against a demand arising out of the partnership.

A partner may call a co-partner who is independent of the result of the action.

* Where the plaintiff sued two on a joint contract, and one pleaded his bankruptcy and certificate:—Held, that, by suing both, the plaintiff had elected not to prove the debt under the separate commission, and that a verdict in that action could not affect the interests of the bankrupt's creditors, one of whom was therefore a competent witness to prove the joint contract. (*Blannin* v. *Taylor*, 1819, N. P., 1 Gow, 199). So, declaration of one partner respecting a transaction antecedent to the partnership, held not to be admissible against the other, without a foundation first being laid shewing that they were jointly responsible, and that it would be going too far to presume a joint liability. (*Catt* v. *Howard*, 1820, N. P., 3 Stark. 5).

One of two partners liable to the demand, but who is not joined in the action, and no plea in abatement, held a competent witness for the plaintiff. (*Fawcett* v. *Wrathall*, T. T. 1826, N. P., 2 C. & P. 305).

† Several persons having agreed to bear equally the expenses of a joint undertaking, in an action brought against one of them, another of the contractors is a competent witness for the defendant if released by him, though the rest do not join in the release. (*Duke* v. *Pownall*, M. T. 1829, N. P., 1 M. & M. 430).

The Court held, that B.'s liability to C. being independent of the result of the action between the partners, C. was a competent witness for B., to prove the loan and transfer of the note to him.

IX. RELATIVE TO BANKRUPTCY CONNECTED WITH*.

BURT *v.* MOULT, E. T. 1833. Ex. 1 *C. & M.* 529; S. C. 3 *Tyrw.* 569.

A transfer of partnership property by a partner, after an act of bankruptcy, is invalid.

ONE of two partners, after an act of bankruptcy, handed over partnership effects, which the jury found to have been done by way of fraudulent preference; and within a few hours after the other partner also committed an act of bankruptcy.

The Court held, that no property passed by such transfer, the former partner having no power at the time to bind the property either of his own assignee or of the insolvent partner.

WHITEHEAD *v.* HUGHES, M. T. 1834. Ex. 2 *C. & M.* 318; S. C. 2 *D. P. C.* 258; S. C. 4 *Tyrw.* 92.

A solvent partner may sue with the assignees of a bankrupt partner.

IN an action by the solvent partner and the assignees of a bankrupt partner—

The Court held, a solvent partner is entitled to use the names of the assignees of a bankrupt partner in suing for the debts due to the firm; but the latter are entitled to indemnity.

LEWIS *v.* EDWARDS, M. T. 1840. Ex. 7 *M. & W.* 300.

An agreement between a solvent partner and the assignees, that he is to have the assets, and pay the debts, does not enable him to sue the official assignee for money had and received.

THE plaintiff, in January, 1838, became partner with B. and P. in a business which had been previously conducted by B. and P. B. and P. shortly afterwards became bankrupt, and the defendant was appointed the official assignee, and other persons the creditors' assignees. In May, 1830, the plaintiff, defendant, and the other assignees entered into an agreement for liquidating the affairs of the concern, whereby it was stipulated, amongst other things, that the defendant should be empowered by the plaintiff to collect the outstanding debts due to the new firm, and pay the amount to Messrs. S. & C. to the account of the plaintiff, being allowed the usual per centage.

The Court held, that the plaintiff alone could not maintain an action against the defendant for money had and received, to recover the amount of the outstanding debts received by the defendant, and of which he had rendered an account.

* See ante, tit. *Bankrupt*, as to the general law on the subject connected with partners, and the cases relating to this Div., *Cumming* v. *Bailey*, H. T. 1830, C. P., 6 Bing. 363; S. C. 4 M. & P. 36, abridged, ante, Vol. 2, p. 27; *Holderness* v. *Shackles*, M. T. 1838, K. B., 8 B. & C. 612, abridged, ante, Vol. 2, p. 78; *Morland* v. *Pellatt*, M. T. 1828, K. B., 8 B. & C. 722; S. C. 3 M. & Ry. 411, abridged, ante, Vol. 2, p. 84; (this case was decided before the 2 & 3 Vict. c. 39); *Woodbridge* v. *Swann*, E. T. 1833, K. B., 4 B. & Ad. 633; S. C. 1 N. & M. 724, abridged, ante, Vol. 2, p. 100; *Craven* v. *Edmonson*, T. T. 1830, C. P., 6 Bing. 734; S. C. 4 M. & P. 622, abridged, ante, Vol. 2, p. 104; *Marsh* v. *Wood*, T. T. 1839, K. B., 9 B. & C. 659, abridged, ante, tit. *Arbitration.*

ABBOTT *v.* HICKS, T. T. 1837. C. P. 5 *Bing. N. S.* 578.

UPON a dissolution of partnership defendant agreed to pay to his co-partners 6,817*l.* 9*s.* 8*d.* as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891*l.* 12*s.* due from the firm to H. After the dissolution they became bankrupt, and never paid H.

A solvent partner cannot set off an undertaking of his bankrupt co-partner.

The Court held, that, in an action by their assignees for the 6,817*l.* 9*s.* 8*d.*, the defendant could not set off their undertaking to pay 51,891*l.* 12*s.* to H.

X. RELATIVE TO THE DISSOLUTION OF.

HEATH *v.* SANSOM, M. T. 1832. K. B. 1 *N. & M.* 104; S. C. 4 *B. & Ad.* 172.

IT appeared, that, after a reference to an arbitrator as to the disposal of the partnership effects, one only had been solely interested.

If no fixed duration, a dissolution may take place at any time.

The Court granted a new trial as to the fact of dissolution. Where there is no stipulation as to the duration of a partnership, a revocation may take place at any time, without any formal dissolution.

BELCHER *v.* SIKES, E. T. 1828. K. B. 8 *B. & C.* 185.

A DEED of dissolution contained a covenant by the withdrawing partner, that, "for and notwithstanding any act done by him," it should be lawful &c., without any let &c. by him, "his executors," &c.—

A subsequent clause in a deed as to dissolving, inconsistent with a former, may be rejected.

The Court held, that the former part of the clause, being inconsistent with the latter, might be rejected; and that a breach, therefore, by the executor having received sums, &c. was well assigned.

VICE *v.* FLEMING, H. T. 1827. Ex. 1 *Y. & J.* 227.

DEFENDANT, part owner and managing director of a mine, informed defendant that he had sold his shares to others, who would in future be his paymasters.

Whether a partner has ceased to be a member is a question for the jury.

The Court held, that the operation of such notice not being absolute in its terms was altogether a question for the jury, whether it amounted to a notice that he would not be responsible for any goods supplied; and, that not having been submitted to them, a new trial granted.

HART *v.* ALEXANDER, E. T. 1837. Ex. 2 *M. & W.* 484; S. C. 7 *C. & P.* 746.

A., B., AND C. were bankers at Calcutta. D., being then in India, deposited money with them in 1815; he came to England in 1821. In 1822, C. retired from the firm, and announced his retirement in the Gazette, in India. In 1823 he announced himself as a candidate for the East India directory, and stated his retirement from the firm in advertisements in newspapers taken in at a reading room to which D. subscribed. After 1822, D. executed two powers of attorney; the first to the firm in Calcutta, their names being all mentioned in it, and C.'s not included; the second, to a late

A retiring partner, who advertises the fact, and shews the plaintiff reads the paper, is evidence for the jury as to non-liability.

partner, who had quitted the house on C.'s retirement, enabling him to receive dividends from the existing firm. D. also received his account annually, from 1822 to 1833, from the firm at Calcutta, during which years the rate of interest varied considerably. The house having become insolvent, and D. having sued C. alone for his balance—

The Court held, that this was evidence to go to the jury of D.'s knowledge of C.'s retirement, and of his adopting the new firm as his debtors.

RATHBONE *v.* DRAKEFORD, H. T. 1830. C. P. 6 *Bing.* 375.

After dissolution one partner cannot bind another*,

ON motion to set aside judgment on a cognovit—

The Court held, that after a partnership has been dissolved, one partner cannot bind the other to pay costs as between attorney and client, and a cognovit signed by one in an action against both was therefore set aside.

SMITH *v.* NEWTON, M. T. 1838. Ex. 4 *M. & W.* 454.

unless so authorized in winding up the concern.

IN an action against partners—

The Court held, where the concern is entirely put an end to, and nothing left but to get in the debts and settle the credits, one partner cannot pledge the credit of the others; but where a retiring partner gave a general authority to the one who was to wind up the concern, to do what he thought proper with the existing securities of the firm, that the latter might indorse bills in the partnership's name, and it was not necessary that such authority should be by deed or writing.

THOMPSON *v.* PERCIVAL, H. T. 1834. K. B. 3 *N. & M.* 167.

Upon dissolution, taking a bill from one partner, whether a discharge of the other, is a question for the jury†.

J. AND C. P. were in partnership. C. P. retires from the firm, and notice is put into the Gazette of the dissolution of the partnership, and that J. P. would continue to carry on the business, and receive and pay all debts of the firm. The plaintiffs, who were creditors of the firm, afterwards applied to J. P. for the sum due to them for goods sold to the firm, upon which occasion they were told that C. P. had retired from the business, and J. P. alone was responsible. The plaintiffs afterwards drew a bill for the amount of the sum due to them upon J. P. alone.

The Court held, that this operated in satisfaction of the joint debt, and amounted to a discharge of C. P., if the jury should think that the plaintiffs agreed to accept J. P. as their sole debtor.

* In an action against two defendants, subsequent to the dissolution of a partnership which had existed between them, on a bill of exchange drawn by one of them in the name of himself and his partners, and dated prior to the dissolution:—Held, that, in the absence of evidence to the contrary, the bill must be taken as having been drawn on the day it bore date, so that both the defendants were liable. (*Anderson* v. *Lewis*, E. T. 1840, C. P., 6 Bing. N. S. 296).

† If A. and B., being partners, dissolve partnership, and in the deed of dissolution it be stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accept a bill of exchange drawn by B. for the amount of the debt due to the firm:—Held, that this stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill of exchange. (*King* v. *Smith*, M. T. 1829, N. P., 4 C. & P. 108).

BELCHER *v.* SIKES, E. T. 1828. K. B. 8 *B. & C.* 185.

Under the words "to recover debts, &c. give discharges, &c.," all sums, whether joint or separate, may be recovered.

TWO parties having been long engaged in contracts, in some of which they had been separately and in others jointly concerned, but in the former they had acted as agent one for the other, and by a deed of dissolution and assignment by one to the other it appeared to have been clearly intended as the simplest mode of settling all disputes, that they should be considered as co-partners in all contracts in which they or either of them had any interest whatsoever; and the retiring partner assigned "all the title, &c. of him, of and in the premises," and power was given by the partner to whom such interest was assigned to recover debts, &c., give discharges, &c.

The Court held, that the latter was entitled to recover all sums due to the former in respect of any joint or separate contract at the time of the execution of the deed.

WHITE *v.* ANSDELL, H. T. 1836. Ex. 1 *M. & W.* 348.

Under a plea that plaintiff was damnified by his own default, defendant cannot shew that the bond was conditional, and that the plaintiff had not performed his part.

UPON an agreement for dissolution of partnership, the stock was to be left in the hands of the continuing partner, who was to pay the debts, and enter into a bond with the defendant as surety to indemnify the plaintiff. In an action on the bond, the breach assigned was, that the plaintiff had been arrested for a partnership debt, for which the plaintiff had been sued with the continuing partner; the defendant pleaded that if the plaintiff had been damnified, it was through his own default.

The Court held, that upon such plea the defendant could not give in evidence that the bond to indemnify was made conditional upon an adjustment of the partnership accounts, and that the plaintiff had not paid over a balance alleged to be due, nor that the costs of the other partner defending the action were less than those of the plaintiff.

Party Wall.

REX *v.* HUNGERFORD MARKET COMPANY, M. T. 1833. K. B. 2 *N. & M.* 340.

The Party Wall Act is not suspended by a local statute*.

A COMPANY, authorized to purchase and take down houses for the purposes of a local act, had purchased that adjoining to the complainant's, and in pulling it down found that the party wall was insufficient, and thereupon gave the usual notice and certificate required under the Building Act.

The Court held, that the latter act was not to be deemed superseded by the local act, so as to give the plaintiff a right to compensation in respect of an injury sustained under the local act, and a mandamus refused.

* An account of the expenses of rebuilding a party wall, delivered in pursuance of the statute of the 14 Geo. 3, c. 38, s. 41, containing a correct statement of the quantity of brick-work done and materials allowed for, is a sufficient account as required by that section, although it also contains a statement of the prices paid for the brick-work and allowed for the materials, which exceed the prices fixed by the statute, and a demand of payment, referring to that account, is sufficient. (*Reading* v. *Barnard*, E. T. 1827, N. P., 1 M. & M. 71).

COLLINS *v.* WILSON, H. T. 1827. C. P. 4 *Bing.* 553.

The party beneficially interested is to contribute to the Party Wall Act if there be no wall before; reasonable notice is sufficient*.

AT the time of the plaintiff's building being erected the adjoining ground was vacant, of which the defendant subsequently obtained a lease, which he afterwards assigned to a third person, reserving an increased rent, and who erected houses thereon attached to the plaintiff's—

The Court held, that the defendant having entitled himself to the improved rent at the time of cutting into the party wall, and being immediately benefited thereby, he was the party liable to contribute to the expense of the whole, under 14 Geo. 3, c. 73; and secondly, that the provision as to giving ten days' notice did not apply to such a case where at the time there was no adjoining house at which it could be left; but it was for the Court to say what, under the circumstances, would be reasonable and convenient notice.

THACKER *v.* WILSON, E. T. 1835. K. B. 4 *N. & M.* 658; S. C. 3 *Ad. & E.* 142.

The executor or administrator of the owner of the improved rent is liable to contribute.

IN an action against an administrator for the moiety of the expenses of building a party wall, pursuant to the directions of the Building Act (14 Geo. 3, c. 78), between a house of the plaintiff, in London, and an adjoining house, of which the defendant was alleged to be the "owner, and entitled to the improved rents."

Per Cur.—The defendant does not distinctly deny that he is the owner of the improved rents, nor does he state any facts which go to shew that he is not liable as owner; but he stands only upon his being owner as administrator. That, we think, makes no difference at all.

WILLIAMS *v.* POCKLINGTON, M. T. 1837. K. B. 2 *B. & Ad.* 878.

But the owner of the improved rent is not entitled to compensation for the use of a party wall under 14 Geo. 3.

IN an action to recover a moiety of the expenses of a party wall, it appeared that the plaintiff, having a term of sixty-one years, let to the defendant on a building lease, for fifty-nine years, land adjoining to his house at an improved rent; that the defendant in building made use of the wall of the plaintiff's house, and when he had completed it, also let it at a further improved rent.

The Court held, that the plaintiff was the owner of the improved rent within the statute 14 Geo. 3, c. 78, s. 41, and that the defendant was not liable to contribute to the expenses of the party wall.

PRATT *v.* HILLMAN, T. T. 1825. K. B. 4 *B. & C.* 269; S. C. 6 *D. & R.* 360.

A party intending to comply

IN an action of trespass for raising a party wall, whereby &c., it appeared that the plaintiff's and defendant's houses had been built

* A tenant, under covenant to repair, cannot maintain an action on the 14 Geo. 3, c. 78, (the London Building Act), against his landlord, for a moiety of the expense of re-building a party wall, which, being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute in his landlord's name, but without his authority. (*Pizey* v. *Rogers*, H. T. 1826, N. P., 1 Ry. & M. 357).

previous to the act 14 Geo. 3, c. 78, and that the defendant intending to comply with its provisions called in the district surveyor, but did not, in fact, comply therewith.

The Court held, that he was nevertheless entitled to the protection of the 100th section, requiring notice of action to be given, and that it should be commenced within three calendar months from the time of the building.

with the 14 Geo. 4, c. 78, is entitled to notice of action, &c.

MURPHY *v.* M'DERMITT, T. T. 1838. Q. B. 3 *N. & P.* 356; S. C. 8 *A. & E.* 138.

IN an action of trespass for prostrating a wall, running half on the land of the plaintiff, and half on that of the defendant, and therefore belonging half to one and half to another.

The Court held, that the one half wall is the abuttal of the other half wall, because they are, in law, two walls; and if the half wall, in respect of which the plaintiff seeks to recover, is described by abuttals, which are appropriate only to the outer wall, his action must fail.

The declaration for prostrating the wall must be accurate as to the abuttals.

WELLS *v.* ODY, E. T. 1835. Ex. 2 *C., M. & R.* 128; S. C. 3 *D. P. C.* 799.

IN trespass for building, obstructing lights, &c., plea, the general issue; the defendant having proved that the wall in question was a party fence-wall, and that he had bonâ fide made the erection for heightening it according to the act, and no notice of action according to 14 Geo. 3, c. 78, s. 100—

The Court held, that the evidence was properly received under the general issue, and the plaintiff rightly nonsuited.

The want of notice of action may be shewn under the general issue*.

WELLS *v.* ODY, E. T. 1836. K. B. 1 *M. & W.* 452; S. C. 7 *C. & P.* 410.

THE 43rd section of the Building Act, (14 Geo. 3, c. 78), which authorizes the raising or building on a party fence wall, does not protect a party from responsibility for any collateral damage resulting from the building so erected; a party wall was heightened in full conformity with the directions of the building act, but the windows of an adjoining house were thereby darkened.

The Court held, first, that an action was maintainable by the occupier of that house; and, secondly, that the forms of the action might be trespass or case.

Case or trespass lies for an encroachment by a party wall.

* Under the general issue given by statute on the Building Act:—Held, that it was competent to the defendant, notwithstanding the Rules of H. T., 5 Will. 4, to shew that the injury complained of, placing bricks, &c. on the plaintiff's wall, was committed in rebuilding a party-wall, under the provisions. (*Wells* v. *Ody*, H. T. 1835, N. P., 7 C. & P. 22; S. C. 2 C., M. & R. 128). The Building Act, 14 Geo. 3, c. 78, s. 100, limits actions to be brought within three calendar months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must bring ejectment. (*Trotter* v. *Simpson*, 1831, N. P. 5 C. & P. 51).

In trespass for building on a wall claimed by plaintiff, the jury having, upon evidence of mutual and beneficial occupation, found that it was a party wall, and a verdict for the defendant, the Court refused a new trial. The plaintiff was bound to establish an exclusive right of possession; and, if the wall had been built before the Statute of Frauds, an interest might have passed therein by parol. (*Wiltshire* v. *Sidford*, M. T. 1827, K. B., 1 M. & Ry. 404).

Patents for Inventions*.

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* By 5 & 6 Will. 4, c. 83, it is enacted, that any person having obtained letters patent for any invention may enter a disclaimer of any part of his specification or a memorandum of any alteration therein, which, when filed, is to be deemed part of such specification.

See 2 Vict. c. 13; 2 Vict. c. 17. And by 5 & 6 Vict. c. 100, s. 7, for preventing the piracy of registered designs, it is enacted, "That during the existence of any such right to the entire or partial use of any such design, no person shall do or cause to be done any of the following acts with regard to any articles of manufacture, or substances in respect of which the copyright of such design shall be in force, without the license or consent in writing of the registered proprietor thereof (that is to say),

"No person shall apply any such design, or any fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article of manufacture, or dry substance, artificial or natural, or partly artificial and partly natural:

"No person shall publish, sell, or expose for sale any article of manufacture, or any substance, to which such design, or any fraudulent imitation thereof, shall have been so applied, after having received, either verbally, in writing, or otherwise from any source other than the proprietor of such design, knowledge that his consent has not been given to such application, or after having been served with or had left at his premises a written notice signed by such proprietor or his agent to the same effect."

Sect. 8. And be it enacted, "That if any person commit any such act he shall for every offence forfeit a sum not less than five pounds, and not exceeding thirty pounds, to the proprietor of the design in respect of whose right such offence has been committed, and such proprietor may recover the penalty mentioned in the statute."

I. RELATIVE TO FOR WHAT PATENTS MAY BE GRANTED, AND REQUISITES OF THE PATENT.

SAUNDERS *v.* ASTON, E. T. 1832. K. B. 3 *B. & Ad.* 881.

The invention must be new*.

THE specification stated the improvement to consist in "the substitution of a flexible material in the place of metal shanks or buttons," and it appeared that neither the button nor flexible shank were new, although the mode of connecting them by a toothed colet was so, but the latter was no where stated as the object of invention.

The Court held, that the claim to the patent could not be supported.

KAY *v.* MARSHALL, E. T. 1839. C. P. 5 *Bing. N. S.* 492; S. C. 7 *Scott*, 548.

The mere application of known machinery is not sufficient.

THE specification stated the invention to consist of new machinery for macerating flax and other similar fibrous substances, previous to drawing and spinning it, which is called the preparing of it, and also for improved machinery for spinning the same after having been so prepared; and the patentee said that he placed the drawing rollers only two and a half inches from the retaining rollers, and that this constituted the principal improvement in the said spinning machinery, and stated the extent of his own invention in respect of improved machinery for spinning flax to be the placing of the retaining rollers and the drawing rollers nearer to each other than they had ever before been placed, i. e. within two and a half inches of each other.

The Court held, that a patent could not be taken out for placing the retaining and drawing rollers of the machine within such distance of each other, the machine being well known and in use before.

LEWIS *v.* MARLING, M. T. 1829. K. B. 10 *B. & C.* 22; S. C. 4 *C. & P.* 52.

A new invention is that which has not been brought into public use.

IN an action for infringement of a patent, the patentees claimed that they were the inventors of a machine for shearing cloth from list to list, by means of a rotary cutter. It was proved that the idea could be extracted from the specification of an older patent; that a specification of it had been received from America, and shewn to several persons; that a model of such a machine had been in England before this patent, and seen by several persons, but no machine

* If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also known, and a person construct a machine to shear from list to list by means of rotary cutters, this is a new invention, and will entitle the inventor to secure his monopoly for it. (*Lewis* v. *Davis*, M. T. 1829, N. P., 3 C. & P. 502). But where a patent was granted for a machine to sharpen knives and scissors, and in the specification this was directed to be done by passing their edges backward and forward in an angular form by the intersection of two circular files; and in the specification it was also stated that other materials ought to be used according to the delicacy of the edge: it was proved, that, for scissors, there ought to be one circular file and a smooth surface; but that two Turkey stones might also succeed:—Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor to be made with one circular file and a smooth surface. (*Felton* v. *Greaves*, E. T. 1829, N. P., 3 C. & P. 611. See Mr. Godson's valuable practical treatise on this subject).

had been made from it; and also, that a similar machine had been made and used for a very short period a long time ago.

The Court held, that these circumstances did not amount to a publication, and consequently that the patent was valid.

MORGAN *v.* SEAWARD, T. T. 1837. Ex. 2 *M. & W.* 143.

Nor is allowing one person to know the secret of a patent a publication which avoids it.

THE plaintiff, afterwards the lessee of a patent for an improvement, had one of the machines made at his own manufactory and at his own expense, but under the direction of the patentee and under an injunction of secrecy, which was taken abroad and used in a concern of which the plaintiff was a proprietor and principal manager.

The Court held this not to be such a publication as to avoid the patent for the invention. If a patent be for several improvements, and the jury find one not to be so, the patent is void altogether.

MINTER *v.* WELLS, M. T. 1834. Ex. 1 *C., M. & R.* 505; S. C. 5 *Tyrw.* 163.

A patent cannot be for a mere principle.

IN an action for infringing a patent, it appeared that the patentee stated, in his specification, that his "invention consisted in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight in the seat acts as a counterbalance to the pressure against the back of such chair, as described," having previously described the nature of such leverage, and how it was to be applied.

The Court held, that it was not a claim for a mere principle, but for a combination carrying that principle into effect, and, therefore, that the patent was valid.

MINTER *v.* MOWER, E. T. 1837. K. B. 1 *N. & P.* 595.

If a patent be for an improvement only, it must not claim to be an invention.

A PATENTEE claimed, in general terms, the application of a principle to produce a mechanical effect, and it was proved that another person had previously applied the same principle to produce the same effect, but with different machinery, and the plaintiff's was a mere improvement.

The Court held, that the patent could not be supported, as the claim was too large.

CORNISH *v.* KEANE, E. T. 1837. C. P. 3 *Bing. N. S.* 570; S. C. 4 *Scott*, 337.

An improvement in manufacturing "elastic fabrics" may be the subject of a patent.

CASE, by a patentee, and the assignee of part of his interest, for the infringement of a patent "for a certain improvement or improvements in the making or manufacturing of elastic goods and fabrics, applicable to various useful purposes." It appeared that the improvement consisted in the placing of elastic threads or strands of India rubber, previously covered by filaments wound round them alternately, side by side with yarns of cotton, as a warp, and combining them by means of a weft when in extreme tension, and deprived of their elasticity, thereby producing a new fabric, of limited elasticity.

The Court held it to be entitled to the protection of a patent, although the materials thus combined were before known and used.

II. RELATIVE TO THE SPECIFICATION.

CROSSLEY *v.* BEVERLEY, H. T. 1829. K. B. 9 *B. & C.* 63; S. C. 1 *M. & M.* 283; S. C. 3 *C. & P.* 513.

THIS was an action on the case for the infringement of a patent for making an improved gas apparatus.

A patentee should disclose to the public any improvement at any time before inrolment.

Per Cur.—A patentee is bound to state in his specification any matter which has occurred to him between the date of the patent and the inrolling of the specification, the making known of which will tend to effect the desired object with greater facility.

LEWIS *v.* MARLING, M. T. 1829. K. B. 10 *B. & C.* 22; S. C. 4 *C. & P.* 52.

THE patentees of a shearing machine claimed in their specification four things, amongst which was a brush for raising the wool of the cloth. It was proved that the brush had only been used once by the patentees themselves, and that they had not sold one with a brush, and that as to some cloth it was entirely useless.

An useless ingredient does not avoid the patent.

The Court held, that, inasmuch as the brush had not been claimed as essential, the mention of it in the specification did not affect the patent, for that every substantive part of a patent need not be useful, although every part claimed must be new.

BLOXAM *v.* ELSEE, H. T. 1827. K. B. 6 *B. & C.* 169.

THE representation of the party, stated in the former patent, was of a machine for making paper of certain width and length, and from the evidence it appeared that the party was not possessed of any machine capable of making it of the width stated, though at a later period he had invented such a method as, if applied to the machine, would effect it, and which was properly set forth in the subsequent grant.

A variance as to the time of the invention is fatal.

The Court held, that the objection as to the time in the first grant was fatal.

DEROSNE *v.* FAIRIE, T. T. 1835. Ex. 2 *C., M. & R.* 476; S. C. 5 *Tyrw.* 393.

IN an action for infringing a patent for improvements in refining sugar, &c., the specification stating it to be by means of charcoal from the distillation of bituminous schistus alone or with animal charcoal, or with the latter alone, and describing the filter made by such charcoal, suggesting that it would be convenient before carbonization to separate the sulphuret of iron mixed with it.

The specification must describe the invention, and the patentee is bound to shew that an article used is not injurious.

The Court held, 1st, that the specification sufficiently described the invention; and 2ndly, that the sulphuret being combined with the schistus obtained in this country, and not shewn to be not injurious in the process of discolouration, the patentee was bound to prove that it was injurious, or that the schistus might be purified from it by persons ordinarily skilled, or that, as found in this country, it was not injurious.

III. RELATIVE TO THE CONSTRUCTION OF.

HALLETT *v.* HAGUE, T. T. 1831. K. B. 2 *B. & Ad.* 370.

In construing a patent the various means adopted may be taken as one sentence.

THE patentee did not claim as his invention the principle, but the apparatus by which he was enabled to evaporate fluids and solutions at a low temperature; and the specification declared that his invention consisted in forcing, by means of bellows or other blowing apparatus, air in a hot or cold state through the liquid to be evaporated, and then added, "and this I do by means of pipes," described as descending perpendicularly into the liquid to the bottom of the vessel from a horizontal one near the surface.

The Court held, that the whole must be taken as one entire sentence, and that it amounted to an allegation of the method of forcing the air through the liquid, and was perfectly distinct from a former apparatus, consisting of a perforated coiled pipe or cullender lying at the bottom of the vessel communicating with the blowing apparatus.

RUSSEL *v.* COWLEY, H. T. 1835. Ex. 1 *C., M. & R.* 864.

And the Court may infer that an instrument mentioned was not to be used.

THE invention claimed by a former patentee was of a mode of manufacturing gas and other tubes by drawing them through rollers, using a maundril in the course of the operation; and a later patent claimed the invention of manufacturing them by drawing them through fixed dies or holes, and was silent as to the use of a maundril.

The Court, upon the whole of the specification, inferring that the maundril was not to be used, held the latter patent good as limited to the welding of tubes without the use of internal support.

IV. RELATIVE TO THE AMENDMENT OF*.

V. RELATIVE TO CONTRACTS BETWEEN PATENTEES.

CHANTER *v.* LEESE, M. T. 1838. Ex. 4 *M. & W.* 295; S. C. *in error*, 5 *M. & W.* 698.

In an action on a contract between patentees the defendant may plead that the invention was not new, and defeat the action.

A DECLARATION in assumpsit stated, that by a memorandum of an agreement between the plaintiff of the one part, and the defendant of the other, after reciting, that, by a certain other agreement previously made between the plaintiff and one of the defendants, the plaintiff did agree with the defendant for the sale of Witty's Patent Furnace; and that the plaintiff had since obtained letters patent for an improvement in furnaces; and that the plaintiff and one M'Curdy had obtained a patent for an improvement in generating

* Where the patentee of a patent originally void entered a disclaimer and memorandum of alteration of part of the specification under 5 & 6 Will. 4, c. 83 (*ante, p.* 112):—Held, that the act was not retrospective, so as to enable him to maintain an action for the infringement previous to the time of such amendment. (*Perry* v. *Skinner*, T. T. 1837, Ex., 2 M. & W. 471).

steam, and the plaintiff and one Ingledan a patent for a metallic wheel and revolving axle; and that the plaintiff was solely interested in a patent for a new mode of abstracting heat from steam, vapour, or other fluids; and that the plaintiff and one Gray had obtained a patent for an improved furnace applicable to locomotive engines: it was agreed between the parties that it should be lawful for the defendants exclusively to use, &c., any or all the aforesaid patent inventions within certain specified districts, upon this, among other considerations, that the defendants should pay to the plaintiff 400*l.* a year during the existence of the said agreement. Breach, non-payment. Pleas, as to the patent for the said supposed improvement in furnaces, (after stating the patent), that it was not a new invention, and that it was not invented or found out by the plaintiff as in the said letters patent mentioned. On special demurrer—

The Court held, that the plea impeaching that part of the consideration only was a good plea to avoid the whole contract, as it did not appear by the declaration that the defendants ever enjoyed any part of the patents which were the consideration for their agreeing to pay 400*l.* a year to the plaintiff, or that that sum could in any way be apportioned amongst the different patents which he might have had.

ELGIE *v.* WEBSTER, M. T. 1839. Ex. 5 *M. & W.* 518.

A partnership in a patent does not exist where the sum is to be returned if no profits.

THE defendant, the inventor of a machine, but wanting capital to carry it into execution, applied to the plaintiff for the advance of a sum, which by an agreement he expressly promised to re-pay; and that, if the invention succeeded and became in general use, the plaintiff should be entitled to one-third of the profit. In an action to recover the money advanced—

The Court held, that the express promise to pay the specified sum prevented its constituting any part of the partnership fund.

VI. RELATIVE TO THE LICENSE TO USE, AND MODE OF ENFORCING COMPENSATION FOR USE OF.

PROTHEROE *v.* MAY, H. T. 1840. Ex. 5 *M. & W.* 675.

The grant of the exclusive use of a patent is a mere license, and does not invalidate the patent.

ON a case sent from the Vice-Chancellor—

The Court held, that a patent vested in twelve persons was not invalidated by the grant of an exclusive license to use it; and the number of persons in whom such license is vested, whether exclusively or not, is wholly immaterial to the validity of the patent; neither would the letters patent be invalidated though the districts covered by the license included the extent of the patent.

BOWMAN *v.* TAYLOR, M. T. 1834. K. B. 4 *N. & M.* 264; S. C. 2 *Ad. & E.* 278.

Under a covenant licensing the use of a pa-

THE declaration in covenant alleged a deed, by which the plaintiff granted to the defendant a license to use certain looms, by which deed it was recited that the plaintiff had invented certain improve-

tent, the defendant is estopped from disputing the invention.

ments, &c., in power-looms, and had obtained letters patent, and caused a specimen to be inrolled.

The Court held, that the defendant was estopped from pleading that the plaintiff was not the inventor, that it was not a new invention, and that no specification had been inrolled.

PERRING, *Ex parte*, T. T. 1837. K. B. 5 *D. P. C.* 750; S. C. 6 *N. & M.* 472; S. C. 4 *Ad. & E.* 949.

Where the King's officers in a dock-yard were instructed as to a patent without contract for remuneration, no mandamus lies to enforce compensation.

IN a patent for an invention, it is stipulated that the patentee shall supply, for his Majesty's service, so much of the invented articles as shall be required, at such reasonable prices and terms as shall be settled for that purpose by the Admiralty. The patentee allows the article to be made at the royal dock-yards, and, at the request of the Navy Board, gives instructions for the guidance of the smiths there, without stipulating for any recompense for the use of the patent. On motion for a mandamus—

The Court held, that it does not lie to the Admiralty to fix a price to be paid to the patentee.

VII. RELATIVE TO THE REMEDIES FOR AN INFRINGEMENT*.

(*a*) DECLARATION.

MINTER *v.* WILLIAMS, M. T. 1835. K. B. 5 *N. & M.* 647; S. C. 4 *Ad. & E.* 251.

In an action for infringement, the declaration must follow the words of the patent.

THE terms of the patent granted the plaintiff the sole right "to make, use, exercise, and vend," and that no others should "make, use, or put in practice," &c.—

The Court held, that a count in an action for infringement, alleging that the defendant wrongfully did "expose to sale" &c., was bad on general demurrer.

(*b*) PLEAS, AND NOTICE OF OBJECTIONS. See 5 & 6 Will. 4, c. 83, s. 4.

FISHER *v.* HEWITT, T. T. 1838. C. P. 6 *D. P. C.* 739; S. C. 4 *Bing. N. S.* 706; S. C. 6 *Scott*, 587.

The defendant may plead that the improve-

IN case for infringing a patent, plea, inter alia, that the improvements, or some of them, were in use long before.

The Court held, that, under 5 & 6 Will. 4, c. 83, s. 4, it was in-

* A. being patentee of an engine, B. bought a license of him to erect it in Cornwall only. C., by agency of Brown, contracted with "A. & Co." to erect such an engine in Cambridgeshire, A. telling C. that B. and D. were his partners. During the building of the Cambridgeshire engine, B. frequently came to inquire how it went on, and when it would be finished. After the engine had failed in its object, C., previous to suing D. and B., inquired from B. if A. had been correct in declaring that B. and D. were his partners, to which he answered that he had; he then sued D. and B. The jury having found a verdict for the defendants, on the ground that B. was not a partner, the Court refused to set it aside, and grant a new trial. (*Ridgway* v. *Philip*, M. T. 1834, Ex., 1 C., M. & R. 415; S. C. 5 Tyrw. 131).

tended defendant should give an honest statement of the objections on which he meant to rely, and that he must state with precision what they are; and, where as general as the plea, a rule absolute granted for further and better particulars.

ment was in use long before, but he must give a specific particular*.

(*c*) Evidence.

Sykes *v.* Sykes, M. T. 1824. K. B. 3 *B. & C.* 541; S. C. 5 *D. & R.* 292.

In an action on the case, it appeared that the plaintiffs, failing in supporting a patent, continued to mark their goods with the words "Sykes's patent," to distinguish them as their manufacture, and the defendants had stamped their own goods, of an inferior description, with a mark resembling as nearly as possible that used by the plaintiffs; and although the defendants did not sell such goods as of the plaintiff's manufacture, yet the retail dealers did.

The Court held, that the allegation in the declaration, that the defendants marked and sold the goods "as and for" goods manufactured by the plaintiffs, was substantially supported by the evidence.

Proof of a party's selling goods of the same name, with a mark resembling the plaintiff's, proves a declaration for selling goods "as and for" the plaintiff's.

(*d*) Witnesses†.

(*e*) Costs‡.

* To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded: 1st, the general issue; 2nd, that the alleged improvements were not new; and, 3rd, that the plaintiffs were not the true and first inventors of the improvement:—Held, that, on this state of the pleadings, it could not be contended that the patent was illegal, as being a monopoly; also, that though all the improvements claimed must be shewn to be new, yet it need not be shewn that the defendant's cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action. (*Gillett* v. *Wilby*, M. T. 1839, N. P., 9 C. & P. 334).

Under the New Patent Act, (5 & 6 Will. 4, c. 83), the Court has the power to order amended particulars of objections, intended to be urged by the defendant at the trial, to be delivered; but semble, that, when the defendant has in his first notice alleged the invention to be old at the time of granting the letters patent, and to have been used by J. H. M., and divers other persons, it cannot require the names, addresses, and descriptions of the persons intended to be called at the trial. (*Bulnois* v. *Mackenzie*, M. T. 1837, C. P., 6 D. P. C. 215; S. C. 4 Bing. N. S. 127).

† In case for the infringement of a patent, a purchaser of a license to use the patent is a competent witness for the plaintiff. (*De Rosne* v. *Fairlie*, H. T. 1835, N. P., 1 M. & Rob. 457). On sci. fa., to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness, who had constructed a machine for the same purposes, a drawing not made by himself, and ask him whether he has such a recollection of the machine he made as to be able to say that that is a correct drawing of it. (*Rex* v. *Hadden*, M. T. 1826, N. P., 2 C. & P. 184).

‡ The 5 & 6 Will. 4, c. 63, s. 5, does not affect the mode of taxation directed by Rule H. T. 2 Will. 4, s. 74; therefore, where, in an action for the infringement of a patent, the defendant obtained a verdict on one issue, which covered the whole cause:—Held, that he was entitled to the costs of that issue, and the general costs of the cause, subject to the deduction in respect of the issues found for the plaintiff. (*Losche* v. *Hague*, T. T. 1839, Ex., 7 D. P. C. 495; S. C. 5 M. & W. 387).

(*f*) NEW TRIAL.

HAYWORTH *v.* HARDCASTLE, T. T. 1834. C. P. 1 *Bing. N. S.* 182; S. C. 4 *M. & Scott,* 448.

If the jury find the invention new and useful, no new trial;

IN an action against the defendant for an invasion of the patent for certain machinery, adapted to facilitate the operation of drying calicoes, muslins, &c., the jury, without going the whole length of the plaintiff's claim, found that the invention was useful on the whole, but that the machine was not useful in some cases, for taking up clothes, &c.

The Court held, that such finding did not vitiate, and refused a new trial.

HAYWORTH *v.* HARDCASTLE, H. T. 1834. C. P. 10 *Bing.* 551; S. C. 4 *M. & Scott,* 448.

but sci. fa. pending, no ground for staying a rule for a new trial.

ON a scire facias—

The Court said, if a writ of scire facias is sued out (but not served) for the purpose of repealing a patent, after a rule nisi is obtained for a new trial, or entering a nonsuit in an action for the infringement of the patent, they will not enlarge the time of shewing cause until after the trial of the action of scire facias.

Pauper.

I. RELATIVE TO SUING IN FORMA PAUPERIS.

(*a*) AS TO CIVIL PROCEEDINGS, p. 120.

(*b*) AS TO CRIMINAL PROCEEDINGS.

1. *Indictments,* p. 121.

2. *Information,* p. 121.

II. RELATIVE TO DISPAUPERING, p. 121.

III. RELATIVE TO COSTS, p. 122.

IV. RELATIVE TO STAYING PROCEEDINGS IN ACTIONS BY, p. 122.

I. RELATIVE TO SUING IN FORMA PAUPERIS.

(*a*) AS TO CIVIL PROCEEDINGS.

LOVEWELL *v.* CURTIS, E. T. 1839. Ex. 5 *M. & W.* 158.

It has been held that the admission to sue as a pauper must be obtained before writ issued*.

THE order for admission to sue in formâ pauperis was made after the commencement of the suit.

The Court held it irregular, and that the plaintiff must elect to be dispaupered, or to find security for costs.

* The Court will not allow a party to prosecute in the King's Bench in formâ pauperis on the common affidavit of poverty, but special grounds must be laid for such an application. (*Rex* v. *Wilkins,* H. T. 1833, B. C., 1 D. P. C. 536).

The application to sue in formâ pauperis, and by his prochein amy, may be

CASEY *v.* TOMLIN, M. T. 1840. Ex. 7 *M. & W.* 189; S. C. 8 *D. P. C.* 892.

AFTER plea of payment of money into Court in an action of assumpsit, the plaintiff obtained an order to sue in formâ pauperis. The money was thereupon ordered to remain in Court till after the trial of the cause, unless the plaintiff would take it out in full satisfaction. The defendants, having got the verdict, obtained a rule for dispaupering the plaintiff, and for having the money paid to them in satisfaction of the costs.

The Court held, that a party may be allowed to sue as a pauper after the commencement of the action.

But it has since been held that a party might apply to sue in formâ pauperis after the commencement of the suit.

(*b*) AS TO CRIMINAL PROCEEDINGS.

1. *Indictments**.

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2. *Information.*

ATTORNEY-GENERAL *v.* DUMMIE, H. T. 1834. Ex. 2 *C. & M.* 393.

A PARTY was admitted to plead in formâ pauperis to an information under the excise laws, upon the usual affidavit—

But the Court refused an application for a copy of the information gratis; it could only allow it to be read over, and he might plead instanter or at a future day.

A pauper is not entitled to a copy of the information gratis.

II. RELATIVE TO DISPAUPERING.

HAWES *v.* JOHNSON, M. T. 1826. Ex. 1 *Y. & J.* 11.

THE plaintiff brought an action against the defendant, an overseer of the poor of the parish of W., to recover the penalty under the 17 Geo. 2, c. 3, s. 3, for not delivering a copy of the rate. A rule was obtained calling on the plaintiff to shew cause why an order made by Mr. Baron *Graham*, admitting the plaintiff to sue in formâ pauperis, should not be discharged.

If a pauper has no meritorious cause of action to recover a penalty, the Court will discharge the order†.

combined; and the rule for so suing need not be drawn up on reading the certificate of counsel, the latter being only for the information of the Court. (*Bryant* v. *Wagner*, T. T. 1839, 7 D. P. C. 676).

On the trial of an action brought in formâ pauperis, a king's counsel or serjeant may appear for the plaintiff alone, without a junior. Where a plaintiff suing in formâ pauperis has a verdict in his favour for 5*l.* or more:—Semble, that the officers of the Court are entitled to their fees. (*James* v. *Harris*, 1835, N. P., 7 C. & P. 257).

* Semble, that if a defendant, in an indictment for a misdemeanor, swears that he is not worth 5*l.* in the world beyond his necessary wearing apparel and tools of trade, he may be admitted to sue in formâ pauperis, although the indictment was removed from the sessions at his instance. (*Reg.* v. *Nicholson*, E. T. 1840, B. C., 8 D. P. C. 489). So, to an indictment in the King's Bench, a defendant will be allowed to plead in formâ pauperis on making an affidavit that he is not worth 5*l.*, &c. (*Rex* v. *Page*, M. T. 1832, B. C., 1 D. P. C. 507.

† Where a pauper plaintiff gave notice of trial, and on the second day of the

Per Cur.—If it appear from the facts of the case, that the plaintiff has no meritorious cause of action, the Court ought to interfere to stay any further proceedings.

III. RELATIVE TO COSTS.

GOUGENHEIM *v.* LANE, M. T. 1835. Ex. 4 *D. P. C.* 482; S. C. 1 *M. & W.* 136; S. C. 1 *T. & G.* 216.

A pauper, though he recovers only one farthing, is entitled to ordinary costs*.

IN trespass by a pauper, he recovered only one farthing damages. On a question as to the costs—

Per Cur.—The authorities shew that the plaintiff is entitled to receive costs, though he does not pay any; and he is entitled to have his costs taxed in the usual way. If the Judge, at the trial, thinks the action to be an improper one, he can certify to deprive the plaintiff of costs.

FOSS *v.* RACINE, H. T. 1839. Ex. 7 *D. P. C.* 203; S. C. 4 *M. & W.* 610.

No set-off of costs against a pauper.

THE plaintiff, suing in formâ pauperis, obtained a verdict of 40*s.* on the first issue, and the defendant on the other—

The Court held, that the plaintiff was not liable to have the defendant's costs set off against the costs of the issue found for him; and semble, if a party be admitted to sue in formâ pauperis after the commencement of the suit, he is not exempt from costs.

IV. RELATIVE TO STAYING PROCEEDINGS IN ACTIONS BY†.

assizes withdrew his record, on the ground of its requiring amendment, the Court dispaupered him. (*Facer* v. *French*, E. T. 1837, B. C., 5 D. P. C. 554).

* The Court will, under 1 Reg. Gen. H. T. 2 Will. 4, s. 110, make absolute a rule requiring a pauper plaintiff to pay the costs of the day for not proceeding to trial. (*Gore* v. *Morphew*, M. T. 1839, B. C., 8 D. P. C. 137).

Where a plaintiff, suing in formâ pauperis, will be absent from England eighteen months, the Court will compel him to give security for costs, or stay his proceedings until his return. (*Foss* v. *Wagner*, E. T. 1834, B. C., 2 D. P. C. 499).

Where a party, suing as a pauper, afterwards petitioned to be discharged under the Insolvent Act, the Court refused a rule for security for costs until he had been dispaupered. (*Mylett* v. *Hucker*, T. T. 1837, B. C., 5 D. P. C. 647).

If one is admitted to defend a suit in Chancery in formâ pauperis, his solicitor can only recover of him money actually paid out of his pocket for the defence of the suit. (*Philipe* v. *Baker*, M. T. 1824, N. P., 1 C. & P. 533). The Court will not make the payment of the costs of the day a condition precedent to the plaintiff's proceeding to a second trial. (*Doe* d. *Evans* v. *Edwards*, T. T. 1834, B. C., 2 D. P. C. 572). But if a pauper withdraws his record because he is not prepared with a certain necessary document at the assizes, the Court will compel him to pay the costs of the day. (*Doe* d. *Lindsey* v. *Edwards*, H. T. 1834, B. C. 2 D. P. C. 471).

Where the opposite party delayed for two years, after the order obtained for admission to sue as a pauper, to apply for costs up to the time of admission, the Court not deciding as to such order being retrospective, refused the application. (*Jones* v. *Peers*, E. T. 1825, Ex., 1 M. & Y. 282).

† A pauper is entitled to his costs from the commencement of an action, although he is admitted to sue in that character in the progress of the suit, and

Paving Act.

See tits. *Action, Notice of—Bawdy House.*

BURNS *v.* CARTER, T. T. 1828. C. P. 5 *Bing.* 429.

ON the question with respect to the time limited for actions for anything done under the local act, 52 Geo. 3, c. 14, (Clink Liberty Paving Act)—

The 57 Geo. 3, c. 29, repeals the 52 Geo. 3, c. 14.

The Court held, that the 57 Geo. 3, c. 29, repealed the 52 Geo. 3, and limited the time for such actions to three calendar months.

BOUVERIE *v.* MILES, T. T. 1830. K. B. 1 *B. & Ad.* 38.

UNDER the 57 Geo. 3, c. 29, s. 72, (Metropolis Paving Act)—

The power to remove obstructions means projections*.

The Court held, that the authority given to the surveyor to remove such things as impede the public passage is to be confined to such things as project upon the public ways, and cannot be extended to rails, &c., standing on a line and inclosing a space over which the public never have had a right of passage.

DONNE *v.* MARTYN, E. T. 1828. K. B. 8 *B. & C.* 62; S. C. 2 *M. & Ry.* 98.

A PAVING ACT imposed certain rates upon all who "inhabited" or "occupied;" and afterwards provided that the names and places of "abode" of a competent number of "substantial inhabitants" should be returned, and collectors of the rate should be appointed from that number.

With respect to the appointment of a collector, the word "inhabitant" means "resident."

The Court held, that the last expression applied only to resident inhabitants; and that a person who was not resident, though liable to be rated as an occupier, was not compellable to serve as a collector.

BUTLER *v.* FORD, T. T. 1833. Ex. 1 *C. & M.* 662; S. C. 3 *Tyrw.* 677.

UNDER a local paving act, no action for any thing done by any person under the act was to be brought until after one calendar month's notice to the clerk of the commissioners.

Under a local paving act, inferior officers are entitled to notice of action.

The Court held, that the notice was not confined to acts done by the commissioners, but to all inferior officers, and that watchmen having ground of suspicion of a felony having been committed by the plaintiff, although they beat him and used more violence than was necessary for apprehending him, were yet entitled to the protection of the notice. Held also, that evidence of the defendants acting as

therefore the defendant cannot stay proceedings on payment of the debt only. (*Morgan* v. *Eastwick*, H. T. 1839, B. C., 7 D. P. C. 543).

* Under the Metropolis Paving Act, (57 Geo. 3, c. 29), a scavenger of a particular district is entitled only to such dust, ashes, &c., as are in the contemplation of the owner rubbish or refuse, and as he desires to dispose of in that character; therefore, where brewers, occupying premises in parish A., burnt coals there in the process of brewing, and when they were partially consumed by being passed once through the fires, removed them, intermixed with the dust and ashes arising from the same fires, to other premises occupied by him in parish B., where he used them for heating water to cleanse the casks:—Held, that the scavenger of parish A. was not entitled to claim the articles. (*Filby* v. *Combe*, T. T. 1837, Ex., 2 M. & W. 677).

such officers under the commissioners was sufficient, without producing their appointment.

COOK *v.* LEONARD, H. T. 1827. K. B. 6 *B. & C.* 351.

With respect to notice of action, "any thing done in pursuance of or execution" of a statute means acts done bonâ fide.

THE defendants, being officers acting under a local paving act, had ordered the plaintiffs to remove a dromedary and monkeys, which were exhibiting in the streets, out of the town, and they were removed into a stable, having thereby ceased to be any nuisance, but the defendants afterwards had attempted forcibly to remove them thence.

The Court held, that there being no reasonable ground for supposing that the act authorized them in so doing, they were not entitled to notice of action. Where an act requires notice before action brought, in respect of any thing done in pursuance of or in execution of its provisions, those latter words are not confined to acts done directly in pursuance of the act, but extend to all acts bonâ fide which may be reasonably supposed to be done in pursuance of the statute.

YOUNG *v.* GROVE, T. T. 1837. Ex. 2 *M. & W.* 703.

The rate attaches, though the party erects houses under a different statute*;

CERTAIN premises consisted of a dwelling-house and stable, which adjoined to and communicated with the Vauxhall Bridge Road, and of garden ground in the rear, which was walled in, and (together with one end of the stable) adjoined to and communicated with a street called Wheeler-street, the street and road forming an angle at the corner of the stable, and the whole of the premises were within the limits of the Tothill Fields Act.

The Court held, that they were liable to be rated by the trustees of that act. Section 122, of the Tothill Fields Act, (6 Geo. 4, c. 134), does not alter the general liability of inhabitants within the limits of the act to repair, &c. the roads within those limits.

DOWNING COLLEGE *v.* PURCHAS, H. T. 1832. K. B. 3 *B. & Ad.* 162.

and may attach on a building after the passing of the act.

PAVING rates under a local act were to be levied in certain proportions on the town and University of C.

The Court held, that a college founded and incorporated with the University, after the passing of the local act, and built on land within the town, but not before the building thereon rated to the paving rate, was to be deemed liable only as part of the University.

REX *v.* SHREWSBURY PAVING TRUSTEES, H. T. 1832. K. B. 3 *B. & Ad.* 216.

As to rates, the word "hereditament" may comprehend gas pipes and apparatus.

A LOCAL paving act authorized an assessment on occupiers of all houses, shops, &c., and other buildings, and "hereditaments," meadow and pasture grounds excepted.

The Court held, that the exception left all other ground, not meadow or pasture, chargeable under the word "hereditaments;" and, consequently, that a gas-light company were chargeable as occupiers of the soil in which their pipes were placed.

* Where overseers are to make and levy a paving-rate in the same way as a poor-rate, their power continues, though it ceases as to the poor-rate. (*Cortis* v. *Kent Waterworks*, T. T. 1827, K. B., 7 B. & C. 314; abridg. post, tit. *Poor*).

BROWN *v.* LORD GRANVILLE, M. T. 1833. C. P. 10 *Bing.* 69.

A LOCAL watching and lighting act authorized a rate on all buildings—

The Court held, that sheds which covered engines for the working of mines were within the act.

And the words, "all buildings," apply to mere sheds.

CANE *v.* CHAPMAN, M. T. 1826. K. B. 1 *N. & P.* 104; S. C. 5 *A. & E.* 647.

IN case against the clerk to paving commissioners, for non-payment of an annuity granted to the plaintiff out of the rates under the local act, for the purposes of the act—

The Court held, first, that a plea, that it was not the duty of the commissioners to pay, &c. was bad, as putting matter of law in issue; secondly, that the charge being made on the rates by virtue of the act, the non-payment of it concerned an act done in pursuance of the act, and the clerk therefore liable to be sued; and, lastly, that the commissioners having neglected a duty in not disposing of the funds raised in the mode prescribed by the act, and not being personally liable or contracting parties, the action was properly brought in case.

Case lies for non-payment of money advanced on the rates; and the commissioners cannot plead it was not their duty to pay, &c.*

Pawnbroker†.

TREGONING *v.* ATTENBOROUGH, M. T. 1830. C. P. 7 *Bing.* 97, *overruling* FITZROY *v.* GWILLIM, 1 T. R. 153.

A PAWNBROKER advanced 200*l.* to a needy trader, upon a deposit of goods, entering the transaction in his books as a loan of

Whether the pawnbroker has

* A paving act provided that, in case the treasurer, collector, officer, or other person, should die or become bankrupt, having money of the commissioners in his hands, that the commissioners should have a priority of claim, and that the collector should sue in his own name for the recovery of any penalty, rate, or other sum, due or payable by any person:—Held, that it did not restrain them from suing in the name of their clerk for mere penalties and rates, but that they might sue the assignees of the bankers for the amount of monies in their hands. (*Frost* v. *Bolland*, T. T. 1826, K. B., 5 B. & C. 611; S. C. 8 D. & R. 384; abridg. tit. *Bankrupt*).

† See 39 & 40 Geo. 3, c. 99; 5 & 6 Will. 4, c. 62; and the 2 & 3 Vict. c. 37, s. 3, which provides that nothing in this act shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers; but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this act had not been passed: continued by the 3 & 4 Vict. c. 83.

A pawnbroker received a parcel of goods on one day, and on that and several subsequent days he advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of three pence in the pound per month on those sums:—Held, that it was a question for the jury whether this really were one transaction or a mere contrivance for obtaining the higher interest on the whole sum, in which case it is void, or whether the advances were really distinct. (*Cowie* v. *Harris*, M. T. 1827, N. P., 1 M. & M. 141).

A pawnbroker is not entitled, under the 39 & 40 Geo. 3, c. 99, s. 2, allowing the rate of one-halfpenny a month for the loan of 2*s.* 6*d.*, to charge by monthly rests, as on a monthly contract; and quære, where the interest involves the fraction of one-farthing, if he can demand the full farthing. (*Rex* v. *Goodburn*, T. T. 1838, Q. B., 3 N. & P. 468; S. C. 8 A. & E. 508),

advanced more than 10*l.* per day is a question for the jury.

several sums, each under 10*l.*, in order to obtain the larger rate of interest. The trader becoming bankrupt—

Tindal, C. J., left it to the jury to say, whether or not the goods had been deposited with the defendant upon a contract to receive more than 5*l.* per cent. interest. The jury found in the affirmative, and accordingly returned a verdict for the plaintiff.

Per Cur.—The question was proper for the jury, we cannot interfere.

NICHOLSON *v.* TROTTER, M. T. 1837. Ex. 3 *M. & W.* 130.

But it will be inferred that the contract was intended to be on the usual terms.

TROVER for watches. Plea, that they were deposited with the defendant, a pawnbroker, for security for money advanced by him, which had not been repaid. Replication, a usurious contract for a loan exceeding 10*l.*, upon which more than lawful interest was to be paid; and on which it was agreed, "that the defendant should forbear, and give day of payment for a certain time, to wit, until the expiration of one year." At the trial, it was proved that no time for forbearance was mentioned: but the Judge amended the record, by inserting, after the words "until the expiration of one year," the words "redeemable in the meantime;" and the jury found a verdict for the plaintiff. Upon motion to enter a nonsuit on the ground that this was not a contract within the 39 & 40 Geo. 3, c. 99—

The Court held, that it was a question for the jury, whether the parties did not intend to apply all the ordinary terms of a pawnbroker's contract to the transaction, although the sum advanced by that pawnbroker exceeded 10*l.*; and unless the contrary be shewn it will be intended to be on the usual terms.

VAUGHAN *v.* WATT, E. T. 1840. Ex. 6 *M. & W.* 492.

Where duplicates are pretended to be lost, and memorandums given, the pawnbroker is entitled to a reasonable time before he gives up the articles.

IN trover, it appeared that on the 24th of July goods were pledged with the defendant, a pawnbroker, in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff, Vaughan, but it did not appear that this fact was then known to the defendant. A few days after, the same person applied to the defendant for a copy of the duplicate, and a form of declaration of the loss of it, pursuant to the stat. 39 & 40 Geo. 3, c. 99, s. 16, and 5 & 6 Will. 4, c. 62, s. 12. On the 6th of August the plaintiff produced the duplicate to the defendant, and demanded the goods, tendering the money advanced on them and interest, but the defendant refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the defendant then (on the 9th August) learnt that the party who pledged the goods was the plaintiff's wife.

The Court held, that a party who obtains from a pawnbroker a form of declaration of the loss of the duplicate is bound to go before a justice of the peace immediately, in order to prove his property in the goods pledged; and the pawnbroker is not justified in refusing the goods to a person who presents the original duplicate, if a reasonable time has elapsed for verifying the declaration. The mere detention of the goods for a reasonable time, with the view to ascertain the real owner, is not, in point of law, a conversion of them.

FERGUSON *v.* NORMAN, M. T. 1838. C. P. 5 *Bing. N. S.* 76; 6 *Scott*, 794.

THE inquiries specified by the 6th sect. of the 39 & 40 Geo. 3, c. 99, (Pawnbrokers' Act), and directed to be made by the pawnbroker forthwith, and before he shall advance any money on the pawn or pledge—

A pawnbroker who has not complied with the requisites of the act has no lien.

The Court held, to constitute a condition precedent, and, if not duly made, the contract is illegal. No property in the thing pawned passes to the pawnee, and his right of lien never attached.

ARMSTRONG *v.* LEWIS, M. T. 1834. Ex. Chamb. 2 *C. & M.* 274; S. C. 4 *M. & Scott*, 1.

TWO carried on business under a partnership deed as pawnbrokers, but one only took the license, and used his name in the business.

A license by one does not avoid a contract between them.

The Court held, that although they might have rendered themselves liable to penalties, yet the agreement containing no stipulation for any infraction of law, it was not void; but aliter, if it had, and that no rights would have been conferred on either party.

REX *v.* CORDING, M. T. 1832, K. B. 1 *N. & M.* 35; S. C. 4 *B. & Ad.* 198.

A QUESTION arising upon the construction of the Pawnbrokers' Act, (39 & 40 Geo. 3)—

Justices cannot commit where the property is lost without default of the pawnbroker*,

The Court held, 1st, a justice of the peace has no power to proceed against a pawnbroker under the 39 & 40 Geo. 3. c. 99, in a case where the goods pawned have been accidentally destroyed by fire; and 2ndly, that a justice has no power to proceed under the above act in any case in which the goods have been lost, unless they have been lost through the default of the pawnbroker.

TATE *v.* CHAMBERS, T. T. 1834. K. B. 3 *N. & M.* 523.

A. HAVING deposited with B. certain goods as a security, a dispute arose concerning the goods, upon which B. obtained from C., a police magistrate, a summons, requiring A.'s appearance on a day named. Upon the appearance before C., he made oath to a written information that he believed the goods to have been illegally pawned or disposed of by A. C. gave a further day to the parties, when, after evidence being gone into, C. committed A. for re-examination on a charge of suspicion of having unlawfully disposed of the goods of B.

and have no jurisdiction under 39 & 40 Geo. 3, unless a charge be substantiated.

The Court held, that the charge was not sufficiently made, so as to give the magistrate jurisdiction over the matter, under the 8th section of the Pawnbrokers' Act, (39 & 40 Geo. 3, c. 99).

* See 5 & 6 Will. 4, c. 62. Where a pawnbroker's servant, having a general authority to receive and deliver pledges, gave up to the prisoner a former pledge upon receiving the money advanced, out of an advance on other valuable articles which were secretly changed, and the whole an intended trick:—Held, that the obtaining the former pledge was not larceny; the property as well as the possession being given by a party authorized. (*Rex* v. *Jackson*, 1826, 1 Moo. C. C. 119).

Payment.

See, also, tit. *Pleas.*

I. RELATIVE TO THE MODE IN WHICH A LEGAL PAYMENT MAY BE MADE.

(*a*) By bill, p. 128.

(*a*) By cheque, p. 128.

II. RELATIVE TO WHOM MADE, p. 129.

III. RELATIVE TO THE TENDER OF PAYMENT, see tit. *Tender.*

IV. RELATIVE TO PLEADING PAYMENT, p. 130.

V. RELATIVE TO REPLICATION TO PLEA OF PAYMENT, p. 131.

VI. RELATIVE TO NEW ASSIGNMENT, p. 131.

VII. RELATIVE TO EVIDENCE OF PAYMENT, p. 132.

VIII. RELATIVE TO THE JUDGMENT ON, p. 133.

I. RELATIVE TO THE MODE IN WHICH A LEGAL PAYMENT MAY BE MADE.

(*a*) By bill.

Holt *v.* Watson, H. T. 1827. C. P. 4 *Bing.* 275.

A lost bill not indorsed is no payment.

Defendant gave to the plaintiff in part payment of goods an acceptance at three months, and which the plaintiff lost, having never paid it away nor indorsed it, and the defendant had never been called upon in respect of the bill.

The Court held, that, as he could not be held to be liable on the bill, it was no answer to the original demand.

(*b*) By cheque.

Hough *v.* May, E. T. 1836. K. B. 6 *N.* & *M.* 535; S. C. 4 *Ad.* & *E.* 954.

A creditor is not bound to treat a cheque as payment.

On an issue, that the defendant did "not pay a sum of money in discharge of the same sum in the plea mentioned," and evidence given of a cheque being sent to the plaintiff before action brought for that sum, describing it as a "balance."

The Court held, 1st, that it was a question properly left to the jury, whether the cheque was received by the party to whom it was sent as money; and 2ndly, that a cheque cannot be deemed a payment unless received as such.

EYLES *v.* ELLIS, M. T. 1826. C. P. 4 *Bing.* 112.

A. and B. kept an account at the same bankers; A. ordered a transfer to B. on one day, and the bankers failed the next:—Held, a payment.

THE plaintiff, in October, authorized bankers at M. to receive a payment from the defendant, who, having an account with the same bankers, directed them to transfer the amount to plaintiff's account, but by mistake this had not been done when the receipt of plaintiff came to the defendant's hands; the plaintiff complaining of this, the defendant on the 8th December ordered the mistake to be rectified, and the transfer was made on that day, and a letter sent by defendant on the 9th, informing plaintiff of it; it did not however reach him until the 11th in the course of the post, and on the 10th the bankers had stopped payment.

The Court held, that the transfer was a payment by the defendant.

See Boyd v. *Emmerson*, 2 *Ad. & E.* 184.

II. RELATIVE TO WHOM MADE*.

IV. RELATIVE TO PLEADING PAYMENT.

REG. GEN., T. T. 1838. Q. B., C. P., *and* Ex. 3 *N. & P.* 381; 8 *Bing. N. S.* 816. 6 *D. P. C.* 649. 4 *M. & W.* 3.

Payment must be pleaded unless credit be given in the particulars†.

IT is ordered, that, in any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he sues to recover a certain balance, without giving credit for any particular sum or sums. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

* Payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is good payment to the merchant, though it turns out that the person was never employed by him. (*Barrett* v. *Deere*, T. T. 1828, N. P., 1 M. & M. 200).

If one allow another to trade in his own name, and as carrying on the business for himself, a payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade the person so carrying it on may recover, unless the person for whom it is carried on assert his own right to the sum due. (*Gardener* v. *Davis*, T. T. 1825, N. P., 2 C. & P. 49).

† Before Rule T. T. 1838, a party was entitled to shew payment in reduction of damages, although no plea of payment was on the record. (*Shirley* v. *Jacobs*, T. T. 1835, C. P., 2 Bing. N. S. 88; S. P. *Lediard* v. *Boucher*, 1838, N. P., 7 C. & P. 1; S. P. *Milligan* v. *Thomas*, M. T. 1835, Ex., 4 D. P. C. 373). But even prior to Rule T. T., in an action of debt, where there was no inquiry of damages, if there were no plea of payment, it could not be given in evidence in reduction of damages. (*Belbin* v. *Bott*, E. T. 1837, Ex., 5 D. P. C. 604; S. C. 2 M. & W. 422).

A payment after action brought might go in reduction of damages, though not pleaded. (*Richardson* v. *Robertson*, E. T. 1836, Ex., 1 M. & W. 463).

In an action for work and labour, the bill of particulars described the action as

EASTWICK *v.* HARMAN, E. T. 1840. Ex. 8 *D. P. C.* 399; S. C. 6 *M. & W.* 13.

Where payment is pleaded after credit in the particulars, it applies to the balance.

ON credit given in the particulars for payments made (whether before or after the action brought), and the balance only sought—

The Court held, that a plea of payment must be taken as pleaded to such balance, and on proof of payment to a greater amount than the balance claimed, the defendant was entitled to the verdict.

BEESLEY *v.* DOLLEY, M. T. 1839. C. P. 6 *Bing. N. S.* 27; S. C. 8 *Scott*, 243.

Plea of payment, after the cause of action accrued*, is sufficient without stating any day;

ON demurrer to a plea of payment—

The Court held an allegation in the plea of payment, that it was made after the supposed cause of action accrued was sufficient to render it unnecessary to state any particular day.

ENSALL *v.* SMITH, M. T. 1834. Ex. 1 *C., M. & R.* 522; S. C. 5 *Tyrw.* 141; S. C. 3 *D. P. C.* 193.—S. P. GOODCHILD *v.* PLEDGE, E. T. 1836. Ex. 1 *M. & W.* 363.

but must conclude with a verification†.

PLEA in assumpsit for goods sold, &c., of payment as to part, and non assumpsit as to the rest, concluding to the country. On demurrer—

The Court held the former plea bad, requiring the conclusion with a verification.

WOOD *v.* FARR, M. T. 1838. C. P. 5 *Bing. N. S.* 247; S. C. 7 *Scott*, 270.

If a plea of payment professes to answer the whole, the plaintiff cannot sign judgment as to part not answered.

TO a declaration, in which the plaintiff claimed 50*l.* for goods sold and delivered, 50*l.* for money had and received, and 50*l.* on an account stated, the defendant pleaded payment of 50*l.*, not averring it to have been paid in satisfaction of the causes of action. The plea professing to be an answer to the declaration, the plaintiff joined issue on the allegation of payment of the 50*l.*, and signed judgment for the damages ultra.

The Court set aside the judgment, but without costs.

brought "to recover 77*l.* 4*s.* 11½*d.*, for work and labour," &c., the particulars of which exceeded three folios; and referring to an account delivered before action brought, which stated that the plaintiff intended to go for 77*l.*, the balance of 123*l.*, and acknowledged receipts by cash for 46*l.* difference:—Held, that this admission did not bring the case within R. G. T. T. 1 Vict., so as to preclude the necessity of pleading payment of the 46*l.* (*Bosley* v. *Moore*, E. T. 1840, Ex., 8 D. P. C. 375).

The new rules of pleading, Hil. T. 4 Will. 4, which direct payment and acceptance to be pleaded and replied, make no difference as to the operation of the Statute of Limitations. (*Brooks* v. *Rigby*, H. T. 1832, K. B., 2 Ad. & E. 21).

In assumpsit, the defendant having proved a payment, there being only the general issue pleaded, the Court refused a new trial, the objection not being taken at the time, and no affidavit of surprise. (*Wright* v. *Skinner*, H. T. 1836, Ex., 4 D. P. C. 741; S. C. 1 T. & G. 277).

* Plea of payment *after action* brought need not mention the costs. (*Corbett* v. *Swinborne*, T. T. 1838, Q. B., 8 Ad. & E. 673).

† So, in an action of *debt*. (*Mack* v. *Rust*, T. T. 1835, Ex., 4 D. P. C. 206; S. P. *Goodchild* v. *Pledge*, E. T. 1836, Ex., 1 M. & W. 363).

V. RELATIVE TO THE REPLICATION TO PLEA OF PAYMENT.

WEBB *v.* WEATHERLY, M. T. 1834. C. P. 1 *Bing. N. S.* 502; S. C. 1 *Scott*, 477.

IN assumpsit for goods sold, the defendant pleaded payment and acceptance of a sum, in full satisfaction and discharge of the promise and damage sustained, &c., and the plaintiff replied that the said sum was not paid by the defendant in discharge and satisfaction, nor did the plaintiff receive it in full satisfaction and discharge of the promise and of the damages sustained. On demurrer—

The Court held the replication good; the plaintiff might take issue on the entire allegation.

The replication may traverse the payment as well as the receipt;

RIDLEY *v.* TINDALL, H. T. 1838. Q. B. 7 *Ad. & E.* 134.

THE defendant pleaded payment of a sum and acceptance in full satisfaction, to which the plaintiff replied that he did not accept the said sum in full satisfaction, &c.

The Court held, the traverse put in issue the payment as well as the acceptance.

but strictly need only deny the acceptance of the money.

VI. RELATIVE TO NEW ASSIGNMENT.

FREEMAN *v.* CRAFTS, T. T. 1838. Ex. 6 *D. P. C.* 698; S. C. 4 *M. & W.* 1.

IN debt, with several counts, plea, that the defendant had paid to the plaintiff several sums, in the whole amounting to a large sum, to wit, the amount of the several debts in the declaration alleged—

The Court held, that the plaintiff need not new assign, but was entitled to recover the balance between amount of debt proved and payment made.

On a plea of payment of all the monies, the plaintiff need not new assign,

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JAMES *v.* LANGHAM, H. T. 1839. C. P. 5 *Bing. N. S.* 553; S. C. 7 *Scott*, 603.

THE plaintiff's demand was for the balance of an account, and the defendant pleaded payment of 100*l.* in full satisfaction, &c. Replication, that the defendant did not pay the said sum in full satisfaction, &c.—

as he may shew he applied it to a different account*.

* Assumpsit. Declaration for 883*l.* 16*s.*, stating that, although 664*l.* 3*s.* 6*d.*, parcel &c., had been paid, the remainder had not. Plea, payment of all sums of money in the declaration mentioned. The replication new assigned that the action was brought, not for 175*s.* 17*s.*, parcel of the monies in the declaration mentioned, but for another like sum, and denied payment of the residue. Pleas: 1st, general plea of payment; and 2nd, denial that the cause of action new assigned was other and different, and issue thereon:—Held, that the plea to the declaration was not to be taken as pleaded to the balance only, and that the replication did not admit payment of 175*l.* 17*s.* as part of the balance, so as to entitle the defendant to a verdict on proof of payment. Such a sum as, together with the 175*l.* 17*s.* admitted in the replication, was equal to such balance. (*Alston* v. *Mills*, H. T. 1838, Q. B., 1 P. & D. 197).

In indebitatus assumpsit, the defendant pleads payment and acceptance in satisfaction. The plaintiff new assigns a different debt of the same amount, with that confessed in the plea; non assumpsit is pleaded to the new assignment. The

The Court held, that, on proof of payment of that sum, the plaintiff having applied it to earlier portions of the account, not to the balance, and the defendant having admitted the balance to be due, the plaintiff was not compelled to new assign.

VII. RELATIVE TO EVIDENCE OF PAYMENT.

See also, ante, p. 131, and post, tit. *Receipt.*

FERGUSON *v.* MASON, H. T. 1839. Q. B. 9 *A. & E.* 245.

Where the issue is taken as to the application of the payment, the plaintiff may prove that the payments applied to other debts*.

IN debt on a lease, for two years' rent at 90*l.* per annum, due 9th November, 1836. The defendant pleaded, as to 135*l.*, parcel of the said rent, that the plaintiff held the premises as tenant to C. at 90*l.* per annum, and that before and at the time when the 135*l.* in the plea mentioned became due, 135*l.* became and was due from the plaintiff to C., and that defendant, to avoid a distress, paid to C. the sum of 135*l.*: replication, admitting

only question for the jury is, whether two debts were incurred, or one only. (*Hall* v. *Middleton*, M. T. 1835, K. B., 5 N. & M. 410).

A plaintiff, in the first count of the declaration, claims two sums of 1000*l.* each; the defendant pleads that on divers days and times his (the defendant's) agents paid to the plaintiff, and the plaintiff accepted from them, divers monies, to wit, to the amount of 2000*l.*, in full satisfaction and discharge of the said two sums of 1000*l.* each, and of all damages sustained by the plaintiff by reason of the non-payment thereof. The plaintiff newly assigns that he commenced the action, and declared therein, as in the said first count mentioned, not for the non-performance by the defendant of his promise as to the monies in that plea mentioned to have been paid, but for the non-performance by him of his promise as to other monies, that is to say, the monies in the said first count mentioned, &c. To this new assignment the defendant pleads payment in the same form as he had pleaded it to the first count of the declaration. On this issue is joined. Semble, that the new assignment is sufficient to entitle the plaintiff to a verdict. (*Cholmondeley* v. *Payne*, 1838, N. P., 8 C. & P. 482).

* Before T. T. 1 Vict. (ante, 129) the admission of money received, in a bill of particulars, could not be taken as evidence of payment without a plea of payment. (*Ernest* v. *Brown*, E. T. 1837, C. P., 5 D. P. C. 637; S. C. 3 Bing. N. S. 674; S. C. 4 Scott, 385). It seems that a written paper containing a statement of mutual accounts between a creditor and a debtor, by whom it was signed, is evidence of payment, and not of a set-off, and ought to be pleaded as such. (*Sinclair* v. *Baggaley*, M. T. 1838, Ex., 4 M. & W. 312). But, quære, whether, in an action of debt, the defendant pleading payment, and not appearing to support his plea, the plaintiff is bound to prove the amount of his debt? (*Mackintosh* v. *Weiller*, M. T., 1835, N. P., 1 M. & Rob. 505). A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him:—Held, in an action by him (to which payment was pleaded) to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question. (*Miller* v. *Hamilton*, H. T. 1832, N. P., 5 C. & P. 433).

On the issue of payment and receipt in satisfaction:—Held, that a receipt signed by the London agent for the attorney, of the debt and costs indorsed on the writ of summons, was admissible without calling the agent. (*Weary* v. *Alderson*, 1836, N. P., 2 M. & Rob. 127).

A. had a claim on B., C., & D. Several months afterwards, B. signed a cheque for a larger sum, in the name of himself and C. & D., as his partners, which was proved to have passed through the hands of A., and to have been appropriated by him to his own purposes. A. died:—Held, in an action by his executors against the three partners for the original claim, that the cheque primâ facie was evidence of payment, but there being other circumstances from which a

the payment to C., averred that the sum so paid was deducted from other sums due from plaintiff to defendant, and that 135*l.* was due from defendant to plaintiff, beyond the sum so paid: rejoinder, that the sums were not so deducted, and traversing that 135*l.* was due beyond; the particulars gave credit for the first year's rent minus 16*l.* 6*s.* 6*d.*

The Court held, that the issue being taken as to the application of the sums paid, the plaintiff might prove that the payments applied to debts independent of the balance of the former year, and leaving it still due.

BOWERS *v.* EVANS, H. T. 1836. Ex. 1 *M. & W.* 214.

ON a plea of payment, the defendant proved payment to the plaintiff's attorney on his account.

The plaintiff may shew defendant had the money back.

The Court held, that the attorney was a competent witness for the plaintiff to show that the defendant afterwards called upon him and got back the money.

VIII. RELATIVE TO THE VERDICT AND JUDGMENT ON.

WRIGHT *v.* AIRES, E. T. 1837. K. B. 1 *N. & P.* 761.

A DECLARATION in an action of assumpsit contained two counts, the former for 10*l.* for instruction, the latter for 10*l.* on an account stated. Damages were laid at 20*l.* The defendant pleaded, first, non assumpsit; secondly, payment of 10*l.* in satisfaction. The plaintiff, before the trial, entered a nolle prosequi to the second count. At the trial, the defendant had a verdict on the plea of payment.

Defendant had a verdict on a plea of payment of a smaller sum in satisfaction of a greater:—Held, plaintiff was not entitled to judgment non obstante veredicto*.

The Court held, that the record must be looked at at the time of

loan of its amount might be inferred, it was left to the jury to say, whether it was a loan by B. alone, or by the partnership, although no memorandum or acknowledgment of any kind was produced, by which the executors could ascertain whether it was a loan. (*Boswell* v. *Smith*, T. T. 1833, N. P., 6 C. & P. 60).

In support of a replication of payment of interest, in answer to a plea of the statute, a witness, who stated that he settled all accounts of the defendant, admitted his hand-writing to an account, leaving the item of payment for interest, although he swore he did not recollect the fact:—Held, to be evidence to go to a jury. (*Trentham* v. *Deverill*, T. T. 1836, C. P., 3 Bing. N. S., 397; S. C. 4 Scott, 128). In an action for sheep sold and delivered, the defendant pleaded a payment of 175*l.* It was proved by J. J. that he received a sum of 175*l.* from the defendant's wife and gave it to the plaintiff:—Held, that evidence might be given, that when the defendant's wife gave him the money, she told J. J. to take it to the plaintiff for the sheep. (*Walters* v. *Lewis*, 1836, N. P., 7 C. & P. 344).

Pleas of payment, or set-off, cannot be found distributively, unless the amount proved by the defendant equals the plaintiff's claim. (*Kilmer* v. *Bailey*, M. T. 1839, B. C., 7 D. P. C. 803; S. C. 5 M. & W. 385; S. P. *Tuck* v. *Tuck*, Id. 114).

On a plea of payment, if that be the only issue, the defendant is to begin. (*Richardson* v. *Fell*, 4 D. P. C. 10). And, where, in assumpsit, the plea was payment as to part, and a set-off as to the residue:—Held, that the defendant was to begin; and that payments in part only being proved, the plaintiff was bound to go into evidence, to shew how much he was entitled to; and the delivery of the particulars before plea made no difference. (*Coxhead* v. *Huish*, T. T. 1838, N. P., 7 C. & P. 63).

* But, in *Down* v. *Hatcher*, E. T. 1839, Q. B., 2 P. & D. 292:—Held, that a plea of payment of a smaller sum in lieu of a claim for a larger in indebitatus assumpsit, was not aided by verdict.

To entitle the defendant to a verdict on a plea of payment he must prove the

trial, and not when the pleas were pleaded; and that, therefore, the plaintiff was not entitled to judgment non obstante veredicto, on the ground that payment of a smaller sum was pleaded in satisfaction of a larger.

NICHOL *v.* WILLIAMS, M. T. 1837. Ex. 2 *M. & W.* 758; S. C. 6 *D. P. C.* 167.

But, where to a plea of payment plaintiff enters a nol. pros., and proceeds on the plea of non assumpsit, he is entitled to damages.

ASSUMPSIT for use and occupation, the sum stated in the declaration being 105*l.* The plaintiff delivered particulars as follows: —"The plaintiff seeks to recover in this action the sum of 52*l.* 10*s.*, being the balance of one year's rent due from the defendant for the occupation of a farm, &c., which he quitted on the 2nd of February, 1833." The defendant afterwards pleaded as to all but 52*l.* 10*s.*, non assumpsit; as to 52*l.* 10*s.* residue, payment. The plaintiff joined issue on the plea of non assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial the plaintiff having proved an occupation for several years, at a rent of 105*l.* a year, the defendants proved payment of all the rent.

The Court held, that the plaintiff was nevertheless entitled to a verdict for nominal damages.

Payment of Money into Court.

I. RELATIVE TO WHEN ALLOWED, p. 135.

II. RELATIVE TO THE AMOUNT TO BE PAID INTO COURT, p. 136.

III. RELATIVE TO THE PLEA OF PAYMENT OF MONEY INTO COURT, AND ORDER FOR, p. 136.

IV. RELATIVE TO THE LEGAL EFFECT OF PAYING MONEY INTO COURT AND PROCEEDING FOR A SUM ULTRA, p. 137.

V. RELATIVE TO TAKING THE MONEY OUT OF COURT, p. 139.

VI. RELATIVE TO COSTS CONNECTED WITH, p. 140.

VII. RELATIVE TO THE VERDICT, p. 142.

VIII. RELATIVE TO NONSUIT, JUDGMENT AS IN CASE OF, p. 142.

exact sum stated in the plea. (*Cousins* v. *Paddon*, M. T. 1835, Ex., 2 C., M. & R. 547; S. C. 4 D. P. C. 488; S. C. 5 Tyrw. 535).

So, where the plaintiff in an action of assumpsit claimed by his bill of particulars the sum of 36*l.* 2*s.* 4*d.*, being the balance of a certain account, to which the defendant pleaded the general issue, payment, and a set-off, except as to the

I. RELATIVE TO WHEN ALLOWED.

Under 3 & 4 Will. 4 defendant may pay money into Court in certain cases under a Judge's order.

By 3 & 4 Will. 4, c. 42, s. 21, it is enacted, "That it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the said superior courts where such action is pending, or a Judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading as the said Judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct."

As to Libel and Slander, see stat. 6 *&* 7 *Vict.*

BARRETT *v.* DEARLE, M. T. 1834. K. B. 3 *D. P.* C. 13; S. C. 2 *Ad. & E.* 82; S. C. 4 *N. & M.* 200.

Unliquidated damages cannot be paid into Court under 3 & 4 Will. 4*.

THE Court refused to allow, in an action by a landlord against tenant for breach of contract to repair, the defendant to pay into court, under 3 & 4 Will. 4, c. 42, s. 21, a sum as compensation and amends, and that it might be received into court under a plea of tender before action brought, such plea being bad in a case of unliquidated damages.

sum of 5*s.* (which was paid into court), and at the trial proved payment to the amount of 29*l.* 17*s.* 3*d.*, and a set-off to the amount of 16*l.* 10*s.* 7*d.* :—Held, that the defendant was not entitled to have a verdict entered for him on those pleas for the amount proved. (*Kilner* v. *Bailey*, M. T. 1837, Ex., 5 M. & W. 382).

* An action for damages, occasioned by the negligently running down the plaintiff's boat by the defendant's vessel, is not an action for a debt or demand within the meaning of the 3 & 4 Will. 4, c. 42, s. 17. (*Watson* v. *Abbott*, M. T. 1833, Ex., 2 C. & M. 150). So, in an action against a sheriff for a false return and for an excessive levy, and for not paying over the residue, the Court refused to allow the sheriff to pay money into Court with costs. (*Woodgate* v. *Baldock*, M. T. 1833, Ex., 2 D. P. C. 256). So, where a whole count applies to a demand for unliquidated damages, money cannot be paid into Court on a part of it. (*Hodges* v. *Lord Litchfield*, M. T. 1833, C. P., 2 D. P. C. 741). But, money may be paid into Court on one of several breaches of covenant contained in a lease set forth in the declaration, if the plaintiff's particular specifies the sum he claims on that breach. (*Smith* v. *King*, M. T. 1833, C. P., 2 D. P. C. 751). However in an action by landlord against tenant for not repairing, the Court refused to allow the defendant to pay money into court by way of compensation and amends, under the 3 & 4 Will. 4, c. 42, s. 21. (*Serle* v. *Barrett*, T. T. 1834, K. B., 4 N. & M. 200; S. C. 2 Ad. & E. 82).

To a count on a bill of exchange or promissory note a defendant cannot pay a smaller sum into court and plead that he was never indebted to a smaller amount, but should shew a failure of consideration, or some other valid defence as to part, and then pay the residue into Court. (*Armfield* v. *Burgin*, H. T. 1840, Ex., 8 D. P. C. 247; S. C. 6 M. & W. 281).

In an action of trespass, a Judge may make an order, before declaration, for the defendant to be at liberty to pay money into Court under 3 & 4 Will. 4, c. 42; and if the defendant pleads, that, "before the plaintiff declared," he paid into Court a sum of money by way of compensation, and avers that the plaintiff has not sustained damage to a greater, &c., on which the plaintiff takes issue, and then issue is found for the defendant, the Court will not grant a rule for judgment non obstante veredicto. (*Edwards* v. *Price*, E. T. 1838, B. C., 6 D. P. C. 487). So, where a defendant was sued at law for a sum of money, and the Court

II. RELATIVE TO THE AMOUNT TO BE PAID INTO COURT.

KIDD *v.* WALKER, M. T. 1831. K. B. 2 *B. & Ad.* 705.

The sum paid into Court must include interest up to that time*.

IN an action on a security bearing interest, the defendant paid into Court a sum equal to the debt and interest up to the time of the action brought, but not to that of paying in the money.

The Court held, that the plaintiff was entitled to proceed in the action, and recover damages for the remaining interest.

III. RELATIVE TO THE PLEA OF PAYMENT OF MONEY INTO COURT, AND ORDER FOR†.

ARMFIELD *v.* BURGIN, H. T. 1840. Ex. 6 *M. & W.* 281; S. C. 8 *D. P. C.* 247.

If the plea of payment of money into Court leaves any part unanswered, it is demurrable‡.

IN debt for goods, &c., with a count on a bill accepted by the defendant, each count for 70*l.*, and concluding in the usual form with a demand of the aggregate amount in the several counts; plea, except as to 20*l.*, parcel of the sum demanded, and for which credit was given by the plaintiff in his particulars, payment into Court of the sum of 13*l.* 12*s*, and that the defendant was indebted in no greater amount.

The Court held the plea bad on special demurrer, in not shewing some answer as to part, and payment into Court as to residue.

allowed him to pay it into Court, to abide the event of an application by him to the Court of Chancery for an injunction, which was accordingly made in January, 1834, but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunction, the Court refused to make an order that the defendant might receive the money out of Court, though a considerable time had elapsed since the bill was filed. (*Best* v. *Argles*, E. T. 1835, Ex., 3 D. P. C. 701).

* A plea of payment of a less sum of money into Court on a general indebitatus count or counts is good, though the amount intended to be appropriated to each count is not shewn. (*Jourdain* v. *Johnson*, M. T. 1835, Ex., 4 D. P. C. 534; S. C. 5 Tyrw. 524).

† By Rule H. T., 2 Will. 4, "No rule or Judge's order to pay money into Court shall be necessary except under the 3 & 4 Will. 4, c. 42, s. 21; but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand."

‡ It is not a ground for arresting a judgment non obstante veredicto, that a plea on which a verdict has been found in favour of the defendant alleges money to have been paid into Court pursuant to 3 & 4 Will. 4, c. 42, s. 21, before declaration. (*Edwards* v. *Price*, E. T. 1838, B. C., 6 D. P. C. 487).

Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into Court of one entire sum in full satisfaction of all the counts or breaches. (*Marshall* v. *Whiteside*, H. T. 1836, Ex., 4 D. P. C. 766; S. C. 1 M. & W. 188).

The Court refused to allow a plea of payment, without paying in the money, on the ground of the sum indorsed having been paid in in lieu of bail. (*Ball* v. *Stafford*, M. T. 1835, C. P., 4 D. P. C. 327; S. C. 2 Scott, 426).

THOMPSON *v.* JACKSON, E. T. 1840. C. P. 8 *D. P. C.* 591; S. C. 1 *Scott, N. S.* 157; S. C. 1 *M. & G.* 242.

ON a plea of payment of money into Court—

The Court held, that a plea of payment of money into Court under 3 & 4 Will. 4, c. 42, s. 1, and R. T. T. 1 Vict. Reg. 1, in bar of the further maintenance of the action, cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action at the time of action brought.

The plea cannot be pleaded to the same cause covered by other pleas.

SHARMAN *v.* STEVENSON, E. T. 1835. Ex. 2 *C., M. & R.* 75; S. C. 3 *D. P. C.* 709; S. C. 5 *Tyrw.* 564.

PLEA of payment into Court (under the new Rules) of part, and no further damages sustained by plaintiff, concluding with a verification, and not with a prayer of judgment, as to further maintaining the action.

The Court held the plea bad; such plea ought to be of the residue only; any defence as to a part of the causes of action ought to be first pleaded, and then payment into Court as to the residue.

And should conclude with the prayer of judgment, and be the last plea*.

IV. RELATIVE TO THE LEGAL EFFECT OF PAYING MONEY INTO COURT, AND OF PROCEEDING FOR A SUM ULTRA.

SEATON *v.* BENEDICT, T. T. 1828. C. P. 5 *Bing.* 31; S. C. 2 *M. & P.* 67.—S. P. DRAKE *v.* LEWIN, T. T. 1834. Ex. 4 *Tyrw.* 730.

ON a question as to payment of money into Court—

The Court held, that payment into Court generally, where no special contract is stated, admits no more than that the sum paid is due; but where there is a special contract, the payment admits that contract.

Payment into Court admits the contract, if special, if not, only as to the sum paid in†.

* Where a defendant has several defences to different parts of the plaintiff's demand, and intends to plead payment into Court as to other parts of the demand, he should first of all plead those pleas, and then the plea of payment of money into Court as to the residue only. (*Coates* v. *Stevens*, E. T. 1835, Ex., 3 D. P. C. 784; S. C. 2 C., M. & R. 118).

† Semble, there is no difference between the effect of a plea of payment into Court and payment under the whole rule, with respect to admission of the liability. (*Levy* v. *Walrond*, M. T. 1836, C. P., 3 Bing. N. S. 841; S. C. 5 Scott, 52).

Payment into Court on several general counts, one only of which was applicable to the plaintiff's demand:—Held, to admit a cause of action on that count only. (*Stafford* v. *Clark*, M. T. 1824, C. P., 2 Bing. 377; S. C. 1 C. & P. 24, 403). So, if in trover the declaration enumerate a great number of articles, and the defendant pay money into Court, and plead that the plaintiff has sustained no greater damages, the plaintiff must shew what articles the defendant has converted; and a declaration in trover being general, the defendant, by this plea, does not admit anything beyond his payment into Court; (*Cook* v. *Hartle*, 1838, N. P., 8 C. & P. 568); but in an action for use and occupation, payment of money into Court admits the contract, and therefore it is not open to him to contend that the plaintiff is without a title, or that another co-plaintiff

BULWER *v.* HORNE, M. T. 1832. K. B. 1 *N. & M.* 117; S. C. 4 *B. & Ad.* 132.—S. P. WIGHT *v.* GODDARD, M. T. 1837. Q. B. 3 *N. & P.* 361; S. C. 8 *Ad. & E.* 144.

Hence, it is an admission of a cause of action in an action against a carrier.

THIS was an action of assumpsit against the proprietors of the Gloucester mail, for not carrying the plaintiff to Cheltenham, after booking a place, with the general indebitatus counts. The defendant pleaded non assumpsit, except as to one guinea, and, as to that, a tender. Payment of one guinea into Court generally—

The Court held the payment an admission of the cause of action, declared upon specially.

HINGHAM *v.* ROBINS, E. T. 1839. Ex. 7 *D. P. C.* 352; S. C. 5 *M. & W.* 94, *questioning* WALKER *v.* RAWSON, 1833. N. P. 5 *C. & P.* 486, *and* MEYER *v.* SMITH, H. T. 1833. K. B. 4 *B. & Ad.* 676.

But as to the common counts, the plaintiff must prove a contract beyond the sums paid in.

THE defendant pleaded payment of money into Court, to a declaration containing the indebitatus counts for use and occupation for goods and fixtures, and the money counts.

The Court held this to amount to an admission only that so much was due on some one of the contracts stated to the extent paid in; and if the plaintiff fails to establish the contract alleged, he cannot recover; but such a plea to a special count would admit the contract therein stated.

STAPLETON *v.* NOEL, H. T. 1840. Ex. 8 *D. P. C.* 196; S. C. 6 *M. & W.* 9.

In an action against two, the plaintiff must prove a joint contract beyond the sum paid into Court*.

PLEA, payment into Court of 10*l.*, with a denial of damages ultra, upon which the plaintiff joined issue. From the particulars of demand, it appeared that the action was brought to recover the sum of 50*l.*, due from the defendants jointly to the plaintiff for wharfage.

Per Cur.—Under a plea of payment of money into Court, the

should have joined in the action, although these facts may appear doubtful on the plaintiff's own evidence. (*Dolby* v. *Iles*, H. T. 1840, Q. B., 3 P. & D. 287).

In an action for an attorney's bill, the defendant may, after a payment into Court, shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges; (*Jones* v. *Reade*, M. T. 1836, B. C., 5 D. P. C. 216); but in a declaration in assumpsit for non-performance of a contract to receive and pay for a copper, made to order at a specified price per pound weight, the defendants pleaded, (inter alia), the payment into Court of 15*l.*, and that the plaintiff had not sustained damage to a greater amount:—Held, that they could not, under this plea, give in evidence that they had countermanded the order when only a part of the work had been done. (*Stevens* v. *Ufford*, H. T. 1835, N. P., 7 C. & P. 97). So, where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would be a bar to the action is not admissible in mitigation of damages. (*Speck* v. *Phillips*, H. T. 1839, Ex., 5 M. & W. 279).

* A plea of payment into Court by two defendants, pleaded to one or more indebitatus counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on to the amount of the sum paid in. (*Archer* v. *English*, M. T. 1840, C. P., 9 D. P. C. 21; S. C. 1 Scott, N. S. 156; 1 M. & G. 873).

Plea of payment of a sum into Court in assumpsit, on the indebitatus count:—Held, to operate as an admission only that the plaintiff is entitled to that extent on some contract, but no evidence of a joint liability. (*Archer* v. *English*, M. T. 1840, C. P., 2 Scott, N. S. 126; S. C. 9 D. P. C. 12; S. P. *Staple-*

plaintiff must then prove affirmatively some contract on which both the defendants are liable, and to an extent beyond the sum paid into Court by them.

V. RELATIVE TO TAKING THE MONEY OUT OF COURT.

PALMER *v.* REIFFEINTEIN, H. T. 1840. Ex. 1 *M. & G.* 94.

In case of death, may be taken out by the plaintiff's representatives*.

A RULE was made in a cause for payment of a sum into Court, which was done; and, pending a rule for judgment as in case of nonsuit, the suit abated by the defendant's death.

The Court held, that the money could only be paid out of Court to the representatives of the defendant, and not on the application of the attorney.

ton v. *Noel*, H. T. 1840, Ex., 8 D. P. C. 196; S. C. 6 M. & W. 9). In an action of indebitatus assumpsit, by the master of a ship for wages against A. W., D. S. W., and T. W., the plaintiff proved a contract in the handwriting of W., signed "A. W. & Co." by which contract he was engaged as master of a vessel, at a yearly salary. He also proved services under the contract for several years, and he then put in a rule to pay into Court a sum of money which was not equal to the amount of the wages. It appeared, on the part of the defendants, that D. S. W. was not a member of the firm of A. W. & Co., and was not an owner of the ship in question. The defendant, in the course of his case, went into accounts including a variety of items, being disbursements on ship's accounts on the one hand, and items to the credit of the owners on the other:—Held, that, under the circumstances, the whole account was referable to one contract, and that the four defendants having paid money into Court, were precluded from setting up that one of the defendants, D. S. W., was not a party to the contract. (*Ravenscroft* v. *Wise*, T. T. 1834, 2 D. P. C. 676; S. C. 1 C., M. & R. 203; S. C. 4 Tyrw. 744).

If, in answer to a declaration in assumpsit, the defendant plead several pleas, which go to the whole cause of action in the declaration, except a specified sum, and, for another, plead payment into Court of a sum of money exceeding that recovered by the former pleas, with the averment, that the plaintiff has not sustained damages to a greater amount than the sum so paid in, on all of which issue is joined, and a verdict is given for the plaintiff on the fourth issue, he is entitled to a verdict for nominal damages on the whole declaration. (*Fisher* v. *Aide*, E. T. 1838, Ex., 6 D. P. C. 594; S. C. 3 M. & W. 486). Where money had been paid into Court in satisfaction of the cause of action, and there was a replication of damages ultra, and the plaintiff had not proceeded to trial pursuant to a peremptory undertaking, the Court permitted the plaintiff to accept the money paid into Court, upon paying the defendant the costs subsequent to such payment; (*Kelly* v. *Flint*, M. T. 1834, 5 D. P. C. 293); and where a defendant pleads payment of a certain sum of money into Court, and that the plaintiff has not sustained damages to a greater amount, the defendant may shew that the items in the plaintiff's demand above that sum were not due from himself. (*Booth* v. *Howard*, H. T. 1836, B. C., 4 D. P. C. 438).

* Where a defendant was sued at law for a sum of money, and the Court allowed him to pay it into Court to abide the event of an application by him to the Court of Chancery for an injunction, which was accordingly made in January, 1834; but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunction, the Court of Exchequer refused to make an order that the defendant might receive the money out of Court, though a considerable time had elapsed since the bill was filed. (*Best* v. *Argles*, E. T. 1835, Ex., 3 D. P. C. 701).

In assumpsit, the defendant pays money into Court, and the plaintiff agrees to take the money and his costs. The costs are taxed, and paid by the defendant, and received by the plaintiff. The plaintiff, altering his mind, does not take the money out of Court, and offers to return the costs, which the defendant refuses to take, the plaintiff discontinues the action, and the costs of the discontinuance are taxed, and paid to the defendant. These facts will not support a plea in another action for the same demand, alleging that the plaintiff received the money paid into Court, and the costs, in full discharge of the action. (*Power* v. *Butcher*, M. T. 1829, K. B., 5 M. & Ry. 327).

JACKSON *v.* HOPKINSON, E. T. 1831. C. P. 7 *Bing.* 557.

But the Court will not allow defendant to take the money out of Court.

THE defendant obtained a rule for a new trial upon the ground of the absence of a material witness, upon the condition of bringing the money into Court—

The Court afterwards refused a rule to allow it to be repaid out to him, on the ground of the plaintiff having refused to answer to a bill of discovery, and being in contempt.

FOULSTONE *v.* BLACKMORE, H. T. 1827. Ex. 1 *Y. & J.* 213.

Before the new rules, taking money out of Court was a stay of proceedings*.

PLAINTIFF, after a peremptory undertaking given to try, took the money paid in out of Court—

The Court held, 1st, that proceedings were thereby stayed, and the judgment afterwards signed by defendant was, if not irregular, yet unnecessary, as incompatible with the state of the proceedings; and 2ndly, that plaintiff was entitled to costs up to the time of payment into Court, notwithstanding his subsequent alleged default.

VI. RELATIVE TO COSTS CONNECTED WITH. See, also, infra, n.*

JONES *v.* OWEN, E. T. 1832. Ex. 1 *D. P. C.* 565; S. C. 2 *C. & J.* 476; S. C. 2 *Tyrw.* 452.

Plaintiff liable to the subsequent costs if he does not recover beyond the sum paid in†.

THE cause of action arose within the jurisdiction of a county court, and a sum of money under 40*s.* was paid into Court under a rule to stay proceedings, omitting the usual undertaking by the defendant to pay the costs, and the defendant offered to give the plaintiff judgment within the first four days of the term after the assizes for the amount paid into court, in order that the question of costs might be decided by the Court, and also required the plaintiff's attorney to inform him whether he intended to proceed for a larger sum, to which an evasive answer was returned, and the plaintiff proceeded to trial and recovered nominal damages.

* But now, by Rule T. T. 1 Vict., it is ordered that the plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours to sign judgment for his costs of suit so taxed, or the plaintiff may reply "that he sustained damages," or, "that the defendant was and is indebted to him," as the the case may be, to a greater amount than the said sum; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit. See also Rule H. T. 2 Will. 4.

† In an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand), the defendant paid 1*l.* 18*s.* into Court under Rule 19 of H. T. 4 Will. 4, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived, within the jurisdiction of the county court of Cardiganshire; and, by order of a Judge, the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed with the view of depriving the plaintiff of his costs, but the Court set aside the order on account of the form of the rule for paying money into court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.* (*Farrent* v. *Morgan*, E. T. 1835, Ex., 3 D. P. C. 792).

The Court set aside the verdict and stayed the proceedings, directing the costs subsequent to the offer to be paid by the plaintiff.

ACKWOOD *v.* READ, M. T. 1839. Ex. 7 *D. P. C.* 810; S. C. 5 *M. & W.* 542.

IN an action for damages defendant took out a summons, calling on the plaintiff to show cause why, upon payment of the sum of 10*l.* into court, with costs, all further proceedings should not be stayed. This, however, the plaintiff's attorney refused to take, and indorsed the summons accordingly. The parties in consequence did not go before the Judge, but the defendant paid the money into Court under the usual plea. On the 17th April the plaintiff replied by taking the money out of Court, and served an appointment to tax.

But the rule as to plaintiff not recovering more than the sum paid into Court, as to costs, does not apply to unliquidated damages.

Per Cur.—The present action, which is not brought for a debt but to recover damages, even supposing a primâ facie case to have been made out against him, he has satisfactorily answered it, by shewing that he had not ascertained, at the time the sum of 10*l.* was tendered nor till after defendant had pleaded, the precise amount of injury done.

PARSONS *v.* PITCHER, H. T. 1838. C. P. 6 *D. P. C.* 432; S. C. 4 *Bing. N. S.* 306.

AFTER an offer of a sum, which the plaintiff refused, the defendant obtained an order to pay it into Court, but did not do so, and the plaintiff, being afterwards willing to accept it, gave notice, that unless it were paid he should proceed, and no notice being taken he filed his declaration, when the defendant paid in the money and the plaintiff took it out.

After an offer to pay under an order and refusal, plaintiff is not entitled to the costs*.

The Court held, that he was only entitled to costs up to the time of the order.

GOODEE *v.* GOLDSMITH, M. T. 1836. Ex. 5 *D. P. C.* 288; S. C. 2 *M. & W.* 202.

IN assumpsit for money had &c., pleas, 1st, as to all except £——, non assumpsit; 2ndly, as to all except the same sum, a set-off, and, as to that sum, payment into Court. Replication, admitting the set-off, that he would not further prosecute as to the said sum, and that he took the money out of Court.

The plaintiff is entitled to the costs of the issue, on payment of money into Court, and the defendant to the costs of

The Court held, that the plaintiff was entitled to costs as to that

* To fix a plaintiff with the costs incurred subsequently to a summons to stay proceedings, upon payment of a less sum than that demanded, which, having been refused, is, after further proceedings, taken out of Court, some ground of vexation and oppression must be clearly shewn. (*Haworth* v. *Holgate*, E. T. 1828, Ex., 2 Y. & J. 257; and see *Carr* v. *Smythers*, 3 B. & B. 168; *Last* v. *Benton*, 2 Marsh. 478; and contra, *James* v. *Raggett*, 2 B. & Ald. 776). Where a defendant offers part of the debt claimed, which the plaintiff at first refuses, but, after being paid into Court, he takes out, the defendant is entitled to costs from the time of the offer; (*Marryott* v. *Clapp*, H. T. 1833, Ex., 1 D. P. C. 701); because, where money paid into Court is at first refused, but afterwards taken out, it is to be taken, primâ facie, as vexatious, and the plaintiff liable to the subsequent costs, unless good cause shewn. Where the defendant subsequently offered a larger sum, the Court refused a rule for setting off his subsequent costs. *Willis* v. *Drake*, T. T. 1836, Ex., 1 T. & G. 503).

the others found for him.

part of the cause of action in respect of which the money was paid into Court, and the defendant to the costs of the other issues.

BROOKES *v.* RIGBY, M. T. 1834. K. B. 4 *N. & M.* 3; S. C. 2 *Ad. & E.* 21.

The 43 Geo. 3, as to arresting a defendant, does not apply after payment of money into Court*.

THE stat. 43 Geo. 3, c. 46, s. 3, for allowing a defendant costs in case of arrest without reasonable or probable cause—

The Court held did not extend to cases where the defendant, under Rule 17 Reg. Gen. H. T. 4 Will. 4, pleads payment into Court, and the plaintiff replies, accepting a smaller sum than what is sought to be recovered in satisfaction and discharge of the cause of action.

VII. RELATIVE TO THE VERDICT†.

VIII. RELATIVE TO NONSUIT, JUDGMENT AS IN CASE OF ‡.

Peace, Articles of the. See ante, tit. *Articles of the Peace.*

* But where the action was brought for 8*l.* 2*s.*, and the plaintiff took out 1*l.* 18*s.*, paid into Court under Reg. 19, H. T. 4 Will. 4, in full satisfaction:—Held, that, although it might be a case for a suggestion, yet the defendant was liable for costs under the terms of the rule under which he paid the money into Court, and obtained a stay of proceedings; and quære, if in any case a suggestion is allowed after payment of money into Court? (*Farrent* v. *Morgan*, E. T. 1835, Ex., 3 D. P. C. 792).

† A declaration in assumpsit against assignees of a bankrupt stated that the plaintiff had agreed with the bankrupt, before the bankruptcy, to permit him to take stones from the plaintiff's quarry at a certain price, for which he, the bankrupt, had undertaken to build, and that he took therefrom stones to the amount of 50*l.*; that the defendants, as his assignees, adopted his contract for building the church, and thereby became bound by its equities, and so liable to pay the plaintiff the 50*l.*, and that afterwards they took from the quarry stones for the same purpose to the amount of 40*l.* Plea, as to the agreement of the plaintiff with the bankrupt, non assumpsit; as to the residue of the causes of action, payment into Court of 6*l.* 12*s.* 11*d.*, which the plaintiff accepted in satisfaction of that sum. The jury having found for the defendant on the first issue:—Held, that the admission in the plea of payment into Court did not entitle the plaintiff to have a verdict entered for him on the other issue. (*Twemlow* v. *Askey*, E. T. 1838, Ex., 6 D. P. C. 597; S. C. 3 M. & W. 495).

‡ Where money had been paid into Court in satisfaction of the cause of action, and there was a replication of damages ultra, and the plaintiff had not proceeded to trial pursuant to a peremptory undertaking, the Court permitted the plaintiff to accept the money paid into Court, upon the defendant paying the costs subsequent to such payment. (*Kelly* v. *Flint*, M. T. 1836, Ex., 5 D. P. C. 293).

Where an action of ejectment is brought on certain breaches, and money is paid into Court on one of them, and the plaintiff takes it out and does not proceed to trial, the defendant is entitled to judgment as in case of a nonsuit. (*Doe* d. *Stanley* v. *Towgood*, M. T. 1833, B. C., 2 D. P. C. 494).

Pedigree*.

DOE *d.* WARREN *v.* BRAY, M. T. 1828. K. B. 8 *B. & C.* 813.

The registry of baptism must be made by a party having authority at the time.

ON a question of pedigree an entry of baptism appeared in the parish register to be in the handwriting of a person who was not the clergyman at the time to which the entry referred, though he became so afterwards.

The Court held this entry to be inadmissible in evidence to prove the baptism; nor were certain memoranda made by the parish clerk at the time of the baptism, corresponding with the entry made by the subsequent clergyman, received in evidence themselves, or to give an explanation sufficient to warrant the admission in evidence of the register.

DOE *d.* FULLER *v.* RANDELL, T. T. 1828. C. P. 2 *M. & P.* 20.

A wife may prove that her husband's child, A. B., was next of kin.

DECLARATION by a wife, that she had heard her first husband say, that after his death the estate would go to F., and after his death to his heir, under whom the lessor of plaintiff claimed—

The Court held, to have been properly admitted to show the relationship of F. to the family.

DOE *d.* OLDHAM *v.* WOLLEY, E. T. 1828. K. B. 8 *B. & C.* 22; S. C. 3 *C. & P.* 402.

After a century it may be presumed a party died without issue.

IN ejectment, the lessors of the plaintiff claimed, through a younger brother, all the brothers being in existence more than a century ago. Proof was given of the pedigree downwards from this younger brother; but there was no evidence whatever as to the other brothers; but, the wills of the persons forming the younger branch, made no mention of those brothers, unless they were dead, and had died without issue, the lessors of the plaintiff might not be entitled.

Vaughan, B., informed the jury that, as there was no evidence to the contrary, they might presume that those brothers were dead, and that they had died without issue. And of that opinion were the Court.

* Declarations of deceased members of a family, in matters of pedigree:—Held, inadmissible after the state of facts had arisen on which the claim was founded, which for that purpose was to be deemed the commencement of lis mota. (*Walker* v. *Beauchamp*, 1834, N. P., 6 C. & P. 560). But, in a question of pedigree declarations ante litem motam:—Held, admissible, although the plaintiff's title was that which the party making such declaration would have had if living. (*Doe* d. *Tilman* v. *Tarver*, 1824, N. P., 1 Ry. & M. 141). So, to prove a pedigree, the declarations of the husband of one of the family are admissible, though he was not otherwise related to the family. (*Doe* d. *Northey* v. *Harvey*, 1825, N. P., 1 Ry. & M. 297). But, the declaration of an illegitimate child:—Held, not within the rule as to members of the family of his reputed father, and rejected in a question of pedigree as evidence of reputation. (*Doe* v. *Barton*, 1836, N. P., 2 M. & Rob. 28).

In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives, a register of burials of a Wesleyan chapel is not admissible to prove the death of the cestui que vie; nor is the evidence of a witness who heard in the family that another of the cestuis que vie was dead. (*Whittuck* v. *Waters*, 1830, N. P., 4 C. & P. 375).

Peer.

COATES *v.* VISCOUNT HAWARDEN, M. T. 1827. K. B. 7 *B. & C.* 388; S. C. 1 *M. & Ry.* 110.

An Irish elective peer is privileged from arrest*.

AN Irish peer, who had voted in the election of representative peers, and whose vote had been allowed by the House of Lords—

The Court held to be privileged from arrest by capias.

Peerage. See tit. *Abeyance.*

Penal Actions.

See tit. *Penalty.*

CHARLESWORTH *v.* RUDGARD, M. T. 1834. Ex. 1 *C., M. & R.* 498; S. C. 4 *Tyrw.* 824.

Whether a party acted in violation of a statute is a question for a jury.

BY 9 Geo. 4, c. 27, (a local act for paving, watching, lighting, and improving the city of L.), commissioners were appointed for carrying the act into effect, and a penalty was imposed upon such of them as being personally interested in the matter in question should act as commissioners in the execution of the act. One of the commissioners, being personally interested in the construction of a footpath opposite his own house, attended a meeting of the commissioners, and spoke upon the question of the mode of constructing such footpath. In an action for penalties—

The Court held, that this was evidence to go to the jury of an acting as a commissioner.

HAWKINS *v.* NEWMAN, H. T. 1839. Ex. 4 *M. & W.* 613.

So, where two offices are not to be held, subject to a penalty, it is for the jury to say whether the officer acted occasionally in discharge of both bonâ fide.

THE corporation (Gravesend Pier Act) were empowered to appoint clerks, a treasurer, &c., but prohibited from appointing the clerk to be treasurer; and the act imposed a penalty on any clerk, or his partner or his clerk, who should officiate for the treasurer; and the corporation had appointed the clerk to be assistant-treasurer, with a salary, and he had discharged some of the duties of the treasurer—

The Court held, that it was for the jury to say whether he acted bonâ fide in the belief of his being appointed an independent officer, or only colourably; and that in the latter case only he would be liable to the penalty.

GREGORY *v.* TUFFS, T. T. 1834. Ex. 1 *C., M. & R.* 310; S. C. 4 *Tyrw.* 820.

A new trial granted after

IN an action on a penal statute, clear evidence having been given of the facts charged in the declaration, the jury were addressed on

* And where it was shewn that the defendant had upon several occasions acted as a Scotch peer in voting at the election of Scotch peers, the Court refused to enter into the validity of his claim, and held him entitled to be discharged from arrest. (*Digby* v. *Stirling*, M. T. 1831, C. P., 8 Bing. 55; S. C. 6 M. & P. 116).

the law on behalf of the defendant, and the act of Parliament was read to them. Lord *Lyndhurst*, C. B., having explained the law to them, they asked for the act of Parliament, and retired, taking it with them. They afterwards found a verdict for the defendant. On motion for a new trial—

verdict for defendant, where the jury act under a mistake*.

Per Cur.—The clearness of the evidence on the part of the plaintiff—there being no evidence on the defendant's side—the conduct of the jury, and their asking for and taking with them a copy of the act of Parliament, have led us to the conclusion that the verdict of the jury in this case was not founded on their opinion of the facts of the case, but upon a mistake of the law. We have conferred with the other Judges upon the subject, and they agree with us, that, under such circumstances, there ought to be a new trial.

Penalty*.

See particular titles, according to subject-matter.

DAVIES *v.* PENTON, H. T. 1827. K. B. 6 *B. & C.* 216.

A penalty is not the subject of a set-off†.

DECLARATION on articles of agreement for the goodwill, &c., of the business of surgeon, &c., in consideration of a certain sum paid, and of two bills of exchange payable at twelve months' date, accepted by the plaintiff, and covenant by the defendant not to practise within certain limits, for true performance of which agreement each bound himself to the other in the penal sum of 500*l.*, as and by way of liquidated damages; and breach that defendant had practised within &c.; to which the defendant pleaded, as a set-off as to part, the non-payment by the plaintiff of the bill of exchange, whereby the said sum of 500*l.* became due and payable to defendant; replication, as to such part of the set-off, that plaintiff became bankrupt, and obtained his certificate, and demurrer thereto.

The Court held, that, looking to all parts of the instrument, the said sum of 500*l.* was clearly intended as a penalty to secure such damages as the party injured ought to receive, and not therefore

* After an action for penalties had been commenced, under 37 Geo. 3, c. 90, s. 27, against an attorney for not having his name inrolled with the Prothonotary, the Court refused to allow it to be entered nunc pro tunc; and an amendment of the declaration also refused, the action, although within the letter, not being within the spirit of the act. (*Swift, Ex parte*, E. T. 1835, C. P., 3 D. P. C. 636).

Where, in a penal action, counsel are regularly retained, the plaintiff cannot himself interpose and claim to be nonsuited. (*Marks* v. *Benjamin*, 1837, N. P., 2 Moo. & Rob. 225).

† Only one penalty can be recovered against the same party under 6 Geo. 4, c. 16, s. 120, though there may be different acts of concealment, and different acts may be given in evidence under one count. (*Brook* v. *Glencross*, 1836, N. P., 2 M. & Rob. 62).

By the New Beer Act, 1 Will. 4, c. 64, s. 15, penalties are recoverable upon the information of any person before two justices, acting in petty sessions in and for the division or place in which the house is situated when the offence was committed. (*Reg.* v. *Rawlins*, 1839, N. P., 8 C. & P. 439).

A sum cannot be treated as liquidated damages where it is applicable to the breach of different stipulations of different degrees of importance. (*Boys* v. *Ancell*, M. T. 1838, C. P., 5 Bing. N. S. 390; S. C. 7 Scott, 364).

the subject of set-off; and although it appeared upon the other parts of the record, that the plaintiff's assignees were entitled to the benefit of the contract, yet that the Court can only look to that part of the record upon which the demurrer arises.

Performance.

See particular titles, according to subject-matter.

SIBONI *v.* KIRKMAN, E. T. 1836. Ex. 1 *M. & W.* 418.

Performance cannot be presumed, even after twenty years.

THE plaintiff, on going abroad, agreed with the defendant's testator to sell an instrument at a given price, which was acknowledged, and to be taken as part of the price of another instrument, to be made for him on his return, which he did not until a lapse of twenty years, and after the death of the party; the defendant, in an action on the agreement, pleaded a performance and acceptance of an instrument in satisfaction; the Judge having directed the jury, that, after such a lapse of time, performance might be presumed—

The Court granted a new trial for the jury to say, whether they found the contract alleged in the plea or not. Upon a second trial, no evidence being offered to prove the plea, and the jury having found for the plaintiff, the Court refused a rule in arrest of judgment.

Perjury.

I. RELATIVE TO WHAT AMOUNTS TO, AND BY WHOM COMMITTED, p. 147.

II. RELATIVE TO THE COURT IN WHICH THE OFFENCE IS TRIABLE, p. 147.

III. RELATIVE TO THE INDICTMENT, p. 148.

IV. RELATIVE TO THE EVIDENCE, p. 150.

V. RELATIVE TO WITNESSES, p. 152.

VI. RELATIVE TO THE TRIAL, p. 152.

VII. RELATIVE TO COSTS, p. 153.

VIII. RELATIVE TO NEW TRIALS, p. 153.

IX. RELATIVE TO THE REMOVAL OF, INDICTMENT FOR, p. 153.

I. RELATIVE TO WHAT AMOUNTS TO, AND BY WHOM COMMITTED*.

II. RELATIVE TO THE COURT IN WHICH THE OFFENCE IS TRIABLE†.

* A party filing a bill for an injunction, and making an affidavit of matters material to it, may be indicted for perjury committed in that affidavit, though no motion is ever made for an injunction. (*Rex* v. *White*, M. T. 1829, N. P., 1 M. & M. 271).

In an answer in Chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the Statute of Frauds, (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer the defendant was indicted for perjury:—Held, that the denial of an agreement, which by the Statute of Frauds was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to his acquittal. (*Rex* v. *Dunston*, 1824, N. P., 1 Ry. & M. 109).

Where the witness gave contradictory evidence in his deposition before the magistrate and on the trial at the sessions, on which latter the perjury was assigned:—Held, that it would not be sufficiently shewn to be false by the mere fact of his having sworn the contrary at another time; but the jury must consider whether there was such confirmatory evidence of the facts stated in the deposition as proved that given at the sessions to be false. (*Rex* v. *Wheatland*, 1838, N. P., 8 C. & P. 238).

Commissioners acting under a fiat of bankruptcy adjudicated A. a bankrupt, and afterwards B. was examined before them touching the estate of A., and gave evidence which was alleged to be false. B. being indicted for perjury, it appeared on the trial that the petitioning creditor's debt was not of sufficient amount, but it also appeared that A. owed other debts, which might have been substituted for the petitioning creditor's debt by order of the Chancellor, under sect. 18 of 6 Geo. 4, c. 16, so as to have rendered the fiat valid, but that no such order had been made:—Held, that, under these circumstances, B. could not be guilty of perjury on this his examination; (*Reg.* v. *Evrington*, 1 Car. & M. 319); but semble, that if B. had been examined by the commissioners in the preliminary proceedings before them, to ascertain whether A. should be adjudged a bankrupt or not, B. might have been guilty of perjury, even though there had been no good petitioning creditor's debt. (Ib.)

An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanor under sect. 70 of the Insolvent Debtors' Act, 7 Geo. 4, c. 57. Perjury under sect. 70 of that act is only committed as to things falsely stated in the schedule. The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury. Debts due to the insolvent are "effects or property" within sect. 70 of the Insolvent Debtors' Act. (*Rex* v. *Moody*, M. T. 1831, N. P., 5 C. & P. 23; S. C. 2 M. & M. 128).

† Where issue was joined on an indictment for perjury, on an information in an inferior court, which was removed by certiorari into the King's Bench (Dublin):—Held, that, upon the construction of 17 & 18 Car. 2, c. 20, restraining the trial at Nisi Prius to issues joined in the superior Court, the Court had no jurisdiction to try such issue. (*Rowe* v. *Rex*, 7 Bli. P. C. 1; S. C. 2 Cl. & F. 43).

Where the perjury was actually committed in the Guildhall of the county of the city of N., on a trial at the sessions, holden therein:—Held, that the indictment might be preferred in the county of the city. (*Rex* v. *Jones*, 1833, N. P., 6 C. & P. 137).

III. RELATIVE TO THE INDICTMENT.

REX *v.* NICHOLL, T. T. 1830. K. B. 1 *B. & Ad.* 21.

The indictment must shew that the question was material*,

AN indictment for perjury alleged, that the material question was, "whether, on the occasion of a certain alleged arrest, L. touched K.," and then the defendant's evidence was set out, and that L. put his arms round him, and embraced him; (innuendo) that L. had, "on the occasion to which the said evidence applied," touched the person of K.

The Court held, that it did not sufficiently appear upon the whole statement, that the evidence was material.

REX *v.* STEVENS, H. T. 1826. K. B. 5 *B. & C.* 246.

and that the defendant was sworn, and must use the words "wilfully and corruptly;"

AN indictment for perjury alleged only that the defendant "then and there falsely and maliciously gave false testimony."

The Court held the indictment bad for not charging that defendant swore wilfully and corruptly. A second count, alleging that, on the trial of the said H., he was found guilty by means of the "false and material testimony of the defendant in the first count mentioned;" that a new trial was granted, and that defendant, knowingly, falsely, wilfully, and corruptly made an affidavit that the evidence given by him on the trial of the said H. was true, "whereas it was false in the particulars in the first count mentioned and set forth:"—Held also bad, there being no distinct averment that the defendant was sworn as a witness, or of what he swore, but that that fact could only be taken by intendment.

REX *v.* CALLANAN, M. T. 1826. K. B. 6 *B. & C.* 102.

but need not state official situation of the

ON an indictment for perjury in an affidavit sworn before a commission—

The Court held, first, that it was not a fatal variance that, in the

* There had been an information on the New Beer Act, 1 Will. 4, c. 64; on an indictment for perjury, alleged to have been committed on the hearing of such an information, it is necessary to aver that the justices were acting in and for the division or place in which the house is situated; but it is not necessary to aver that they were acting in petty session, as every meeting of two justices in any place for business is itself a petty session. (*Reg.* v. *Rawlins*, 1838, C. C. C., 8 C. & P. 439).

An indictment, charging an insolvent with perjury as to his schedule, containing a "full, true, and perfect account of all debts," &c., merely negativing that the said schedule did not contain a full, true, and perfect account, &c., without specifying any debts omitted:—Held too indefinite, and ordered to be struck out of the list, the learned Judge saying he would take no notice of such a record. (*Rex* v. *Hepper*, H. T. 1825, N. P., 1 Ry. & M. 210; S. C. 1 C. & P. 608). So, where the indictment for perjury on a charge of felony merely stated, that the defendant went before justices, and deposed (setting out the deposition of the party having done so, amounting to felony), and assigning perjury therein, but there was no allegation that any charge of felony had been made, or any judicial proceeding pending before the justices:—Held bad. (*Reg.* v. *Pearson*, 1837, N. P., 8 C. & P. 119).

Amendments under 9 Geo. 4, c. 15, should be very sparingly made in criminal cases. An indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment signed since the Rule of H. T., 4 Will. 4, alleged that the judgment was entered up "in or as of" Trinity Term, 5 Will. 4:—Held, that this was bad, and the Judge would not amend it under the stat. 9 Geo. 4, c. 15. (*Rex* v. *Cooke*, 1836, N. P., 7 C. & P. 559).

indictment, the matters were set out as continuous, being separated by other matters in the affidavit, the 23 Geo. 2, c. 11, requiring, in such indictments, only the substance of the offence charged to be set out; and secondly, that it need not state the official situation of the party before whom sworn, but that it was sufficient to state the name of the person or Court before whom sworn.

party before whom sworn.

REX *v.* DUDMAN, M. T. 1825. K. B. 4 *B. & C.* 850; S. C. 6 *D. & R.* 324.

AN indictment for perjury, on a petition before the Chancellor, stated that, at the several meetings before the commission, the petitioner declared &c., and on production of the petition at the trial the allegation appeared to be that, at the several meetings before the commissioners, &c.

And stating a document truly in substance and effect is no variance*.

The Court held, that it being sufficient if the petition were set out truly in substance and effect, and the word "commission" being of equivocal meaning, and might be used to denote either a trust or authority exercised, or the persons by whom it was exercised, or the instrument by which it was exercised; and as it could only be consistent with the previous allegations of the indictment by construing it to denote the persons to whom the authority was given, the Court would do so, and that there was no variance.

REG. *v.* VIRRIER, T. T. 1840. Q. B. 4 *P. & D.* 161.

AN indictment for perjury before an election committee, on a petition for bribery, stated that B. and C., at a stated time, went to

And the indictment is sufficient

* An indictment for perjury, in setting out the record of a conviction at the Middlesex sessions, stated an adjournment to have been made by — Const, Esq., and A., B., C., and D., and others, their fellows, &c., justices. An examined copy of the record of conviction, when produced, stated the adjournment to have been made by — Const, Esq., and E., F., G., and others, &c.:—Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment:—Held, also, that, no such evidence being given, the variance was fatal. (*Rex* v. *Bellamy*, M. T. 1824, N. P., 1 Ry. & M. 171). So, if A. be indicted for perjury, in swearing that he did not enter into a verbal agreement with B. and C. for them to become joint dealers and co-partners in the trade or business of druggists; and it appeared that, in fact, B. was a druggist keeping a shop with which A. had nothing to do, but that A. and C., being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name, with his consent, he agreeing to divide profits and loss with A. and C.; this will not support the indictment, as this is not the sort of partnership denied by B. upon oath. (*Rex* v. *Tucker*, M. T. 1826, N. P., 2 C. & P. 500). But where, in an indictment for perjury alleged to have been committed by the defendant, as a witness in a civil action, it appeared that the evidence given on that trial by the defendant contained all the matter charged as perjury; but other statements, not varying in the sense, intervened between the matters set out:—Held to be no variance, although in the indictment evidence appeared to have been given continuously. (*Rex* v. *Solomon*, 1825, N. P., 1 Ry. & M. 252). So, where the indictment alleged that the defendant swore to certain facts; but it appeared in evidence that the wife in the first instance deposed to the facts of an assault in a certain information, to which the defendant afterwards added his deposition that A. B. was one of the persons who assaulted, &c.:—Held no variance, it being sufficient that what the defendant swore was set out in substance. (*Rex* v. *Grindall*, H. T. 1827, N. P., 2 C. & P. 563). And upon an indictment for perjury, alleged to have been committed on the trial of a cause before one of the Judges of the Court of King's Bench, without prout patet per recordum, it is no variance that the postea alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the Judge specified. (*Rex* v. *Coppard*, M. T. 1827, N. P., 1 M. & M. 118).

ent if it indirectly shews the matter on which the defendant was sworn as a witness.

the defendant's house, when C. promised, &c., and B. put a sovereign into the voter's hand, and that the defendant, being sworn to speak the truth concerning the premises, deposed touching and concerning the said election and the matter of the petition, that B. and C., shortly before B.'s election, came on a canvassing visit &c., alleging the act of bribery; (innuendo) thereby meaning that, at the said time when B. and C. went to the defendant's house as aforesaid, the act of bribery was committed. On motion to arrest the judgment—

The Court held, 1st, that the allegation, that defendant deposed "touching and concerning the said election," sufficiently pointed to the matter on which the defendant was sworn as a witness; and, 2ndly, that the innuendo "at the said time" properly referred to the canvassing mentioned in the introductory colloquium, and no other.

REX *v.* ROPER, E. T. 1817. K. B. 6 *M. & Selw.* 327.

After verdict, though the indictment intitle a cause by initials, it is sufficient.

AN indictment for perjury alleged that "Francis Cavendish Aberdeen (with others) preferred their" bill of complaint in the Exchequer against the defendant, "which remains filed," &c., and that the defendant exhibited the answer in writing of him the said defendant to the aforesaid bill of complaint; but going on to set forth the answer to the bill, stated the latter as intitled of F. C. Aberdeen, by the initials only—

The Court held, that, after the verdict, the finding was sufficient that it was the defendant's answer to the bill in question, the indictment vouching the record as the medium of proof of such a bill.

IV. RELATIVE TO THE EVIDENCE.

REX *v.* KOOPS, E. T. 1837. K. B. 1 *N. & P.* 828; S. C. 6 *Ad. & E.* 198.

To prove the materiality, admissible evidence must be given;

ON an indictment for perjury, in an affidavit in support of a petition in the Insolvent Court, and in proof of its materiality, evidence was offered of the practice of the Court—

The Court held, that a paper purporting to be a printed copy of the Rules of the Court, but not authenticated, was not admissible as proof of the practice.

REX *v.* LEECH, E. T. 1828. K. B. 2 *M. & Ry.* 119.

and it must appear that the proceedings could have been supported*.

AN indictment for perjury, on an excise information, stated that the defendant gave the justices to be informed that W. S., "being a brewer," did neglect &c., but the information produced did not contain the words, "being a brewer."

* A. was indicted for perjury, alleged to have been committed on the trial of B. for perjury. The indictment against A. averred, that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment against B. was afterwards reversed, on writ of error:—Held, that the reversal of the judgment against B. was no ground of defence for A., as shewing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted. (*Reg.* v. *Meek*, 1840, N. P., 9 C. & P. 513). So, if, in an indict-

The Court held, that, as such an information could not have been been supported, the variance was fatal.

ment for perjury against C. D., it is averred that a cause was depending between A. B. and C. D., a notice of set-off, intitled in a cause "A. B. against C. D.," and signed by the attorney of C. D., is not sufficient evidence to support the allegation; (*Rex* v. *Stoveld*, T. T. 1834, N. P., 6 C. & P. 489); but, in an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant referrible to the fact on which perjury is assigned. Proof of the evidence set out by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but says that he has stated, to the best of his recollection, all that was material to the present inquiry, and relating to the transaction in question, and is positive nothing was said qualifying the evidence proved, is sufficient to go to the jury; (*Rex* v. *Rowley*, 1825, N. P., 1 Ry. & M. 299); and, to prove perjury, it is sufficient if the matter alleged to be falsely sworn be disproved by one witness, if, in addition to the evidence of that witness, there be proof of an account or a letter written by the defendant, contradicting his statement on oath. (*Rex* v. *Mayhew*, H. T. 1834, N. P., 6 C. & P. 315).

On an indictment for perjury, committed on the hearing of a parish appeal at the quarter sessions, the production of the sessions book is not sufficient proof that the appeal came on to be heard, and a regular record ought to be made up on parchment, and the same as on a return to a certiorari, and that record, or an examined copy, must be produced. (*Rex* v. *Ward*, 1834, N. P., 6 C. & P. 366).

An affidavit, purporting to be sworn before a public commissioner, is admissible, without proof of the commission; proof of the commissioner's acting as such is sufficient. (*Rex* v. *Howard*, T. T. 1832, N. P., 1 M. & Rob. 187).

Perjury was assigned on an answer in Chancery to a bill, before it was amended —Held, that, to support the allegations respecting the bill, it was sufficient to put in the amended bill, and prove that the amendments were in the handwriting of a clerk in the Six Clerks' Office, whose duty it would be to make them, but that it was not necessary to call the person who wrote the amendments. (*Rex* v. *Laycock*, M. T. 1830, N. P., 4 C. & P. 326). An indictment for perjury charged that, in a suit in Chancery, it became material to ascertain whether an annuity, granted by G. H. to the defendant, or by G. H. to B. as trustee for the defendant, had been paid up to the year 1828, and that the defendant falsely swore that it had not been paid, whereas, in truth, the annuity had been paid by G. H. to B., and B. had paid it to the defendant. With a view of shewing that B., who had been abroad since 1832, had paid the money to the defendant, it was proved that B. had sent money to his bankers by his clerk, and it was proposed to ask the clerk the following question: "At the time you received this money from Mr. B., to pay in at the bankers, what did he say about the money?"—Held, that the question might be put, and that the answer was receivable in evidence against the defendant. (*Reg.* v. *Hall*, H. T. 1838, N. P., 8 C. & P. 358).

On the trial of an indictment on the Crown side of the assizes, where it appeared that the attornies on both sides had agreed that the formal proofs should be dispensed with, and that that part of the prosecutor's case should be admitted, the Judge would not allow this admission, and the prosecutor not being prepared with the formal proofs, the defendant was acquitted. A Judge will not allow a criminal case, upon the Crown side of the assizes, to be tried on admissions of this sort, unless they be made at the trial by the defendant, or his counsel. (*Reg.* v. *Thornhill*, 1838, N. P., 8 C. & P. 575).

A person, in his deposition before a magistrate, deposed to several material facts in a case of larceny. When called as a witness at the quarter sessions, on the trial of the larceny, he contradicted every statement he had made before the magistrate. In an indictment for perjury, his evidence on the trial at the quarter sessions was charged to be false:—Held, that, on the trial of the indictment for perjury, the deposition before the magistrate was not by itself sufficient proof that the evidence on the trial at the quarter sessions was false, but that other confirmatory evidence must be given to satisfy the jury that the statements made by the party at the quarter sessions were, in point of fact, false, or that the statements in the deposition were, in point of fact, true. (*Reg.* v. *Wheatland*, 1838, N. P., 8 C. & P. 238).

On an indictment for perjury, in a charge before justices of bestiality, and that the party had the flap of his trowsers unbuttoned, the two witnesses to disprove being the party and his brother, who swore that his brother was not absent from

V. RELATIVE TO THE WITNESSES*.

VI. RELATIVE TO THE TRIAL†.

him on the alleged occasion more than three minutes, and that the trowsers he then wore had no flap:—Held, that the corroborative evidence was sufficient to go to the jury, and the averment of the materiality of the state of the dress was sufficient:—Held, also, that the indictment sufficiently stated it as a judicial proceeding pending before the magistrate. (*Rex* v. *Gardiner*, 1839, N. P., 8 C. & P. 737).

In an indictment for perjury, a suit in the Ecclesiastical Court was stated to have been depending between W. P. and R. M. The proceedings of the suit, when produced, were between W. P. and R. M., the elder:—Held, no variance. (*Rex* v. *Bailey*, 1835, N. P., 7 C. & P. 264).

On an indictment for perjury, committed on the trial of a cause, it is sufficient to go to the jury if a witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. (*Rex* v. *Rowley*, 1825, 1 Moo. C. C. 111). So, to support an indictment for perjury committed on a trial at the quarter sessions, three witnesses, who heard the party examined, stated what he swore on that trial, and the party was convicted, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave. (*Rex* v. *Munton*, M. T. 1829, N. P., 3 C. & P. 498). Where the perjury was assigned on matters deposed to in reply to the evidence of a defendant in the original proceeding, who had been acquitted and examined; but the indictment did not state the acquittal, nor did it in fact appear:—Held, that it was sufficient to shew the fact that he was examined. (*Rex* v. *Browne*, H. T. 1829, N. P., 1 M. & M. 315; S. C. 3 C. & P. 572).

* On an indictment for perjury committed by A. on the trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution merely on the ground that he has not paid the debt and costs and has filed a bill in equity; but it seems that if B. expects that A. will be a witness against him in a similar action coming on for trial soon after the indictment, that is such an immediate interest in B. as will disqualify him from being a witness. (*Rex* v. *Hulme*, H. T. 1835, N. P., 7 C. & P. 8, questioning *Rex* v. *Dalby*, Peake, N. P. C. 12, and *Rex* v. *Eden*, 1 Esp. N. P. C. 97). So, on an indictment for perjury alleged to have been committed at the Quarter Sessions, the chairman of the Quarter Sessions ought not to be called upon to give evidence as to what the defendant swore at the Quarter Sessions. (*Rex* v. *Gazard*, 1838, N. P., 8 C. & P. 595). However, on the trial of an indictment for perjury, where the perjury was alleged to have been committed before a magistrate, the written deposition of the defendant taken down by the magistrate was put in to prove what he then swore. After this it was proposed to call the attorney for the prosecution to prove some other matters which the defendant then swore, which were not mentioned in the deposition:—Held, that this could not be done. (*Rex* v. *Wylde*, 1834, N. P., 6 C. & P. 380). But, on an indictment for perjury against a bankrupt in his affidavit in support of a petition to supersede:—Held, that the petitioning creditor's assignees and creditors were competent witnesses to prove the validity of the commission. (*Reg.* v. *Keat*, 1837, 2 Moo. C. C. 24).

A cause was referred by a Judge's order to C. D., and by order it was directed that the witnesses should be sworn before a Judge, "or before a commissioner duly authorized." A witness was sworn before a commissioner for taking affidavits, and examined vivâ voce by the arbitrator:—Held, that a witness so sworn was not indictable for perjury. (*Rex* v. *Hanks*, 1828, N. P., 3 C. & P. 419).

† Where the defendant, on a charge of perjury, had neither been in custody nor on recognizance, nor given notice to the prosecutor:—Held, that the latter could not be compelled to try at the same assizes at which the bill was found. (*Reg.* v. *Trenfield*, 1840, N. P., 9 C. & P. 284),

It is the practice at the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is any way undetermined, except in cases where the Court in which it is pending postpones the decision of it, in order that the criminal charge may be first disposed of. (*Rex* v. *Ashburn*, 1837, C. C. C., 8 C. & P. 50).

VII. RELATIVE TO COSTS*.

VIII. RELATIVE TO NEW TRIALS.

REX *v.* TREMEARNE, T. T. 1826. K. B. 5 *B. & C.* 761; S. C. 8 *D. & R.* 591.

On a new trial the prosecutor cannot prefer a new bill.

A NEW trial was granted, after conviction of perjury, on a second indictment preferred, and the prosecutor, instead of carrying down the same record, preferred a new bill.

The Court refused to consider it as an amendment, and to stay the proceedings until the prosecutor had paid the costs of the former indictment.

IX. RELATIVE TO THE REMOVAL OF, INDICTMENT FOR.

Pew.

See tit. *Churches and Chapels.*

LOUSLEY *v.* HAYWARD, T. T. 1827. Ex. 1 *Y. & J.* 583.

A person living out of the parish may prescribe for a pew;

THE right to a pew was claimed by the plaintiff on the ground of reparation and enjoyment for a considerable length of time. The pew was situated in the body of the church, and the house in respect of which the plaintiff was, as he contended, entitled, was not within the parish. A verdict was found for the plaintiff; and at the trial Mr. Justice *Lawrence*, in answer to an observation made, that a prescription might under such circumstances be good for a pew in the aisle but not in the body of the church, said he saw no substantial distinction: and motion was made to set aside the verdict on the ground of this distinction.

But the Court refused to interfere.

An indictment for perjury was found at the Spring Assizes of 1838, and at the Summer Assizes of 1838 the defendant entered it for trial as a traverse, he having been on bail more than twenty days. The defendant had not given the prosecutor any notice of trial, and when the case was called on the counsel for the prosecution stated, that the prosecutor was not prepared to try, as he had received no notice:—Held, that, although the defendant had been on bail more than twenty days, he still could not force the prosecutor to try, as he had given him no notice of trial. The case therefore stood over to the next assizes. (*Reg.* v. *Minshull*, 1838, N. P., 8 C. & P. 576).

* The prosecutor in a case of perjury, who has included his name in a subpœna, is entitled to his costs as prosecutor, though he is bound over to prosecute by a magistrate, and he is not limited to his expenses incurred as a witness only. (*Rex* v. *Sheering*, 1826, C. C. C., 7 C. & P. 440).

† A Judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common law, found at the quarter sessions and removed by certiorari into the King's Bench, an indictment so found being void. (*Rex* v. *Haynes*, 1825, N. P., 1 Ry. & M. 298).

BYERLEY *v.* WINDUS, H. T. 1826. K. B. 5 *B. & C.* 1.

but, inhabitants of an extra-parochial place cannot claim a pew without prescription.

ON a prohibition—

The Court held, that extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and therefore, if they sue in the Ecclesiastical Court, to be quieted in the possession of such seats, this Court will grant a prohibition.

JONES *v.* ELLIS, E. T. 1828. Ex. 2 *Y. & J.* 265.

A perpetual curate of a chapelry may support trespass for pulling down a pew.

IN trespass by the perpetual curate of a chapelry which had been augmented under Queen Anne's bounty—

The Court held, that he had a sufficient possessory title to maintain trespass for pulling down pews, &c., even against the chapelwardens; who, although they may have the power of allotting the seats as between parishioners or as against strangers occupying them, yet as against the parson have no joint possession so as to disable him from maintaining trespass against them.

MORGAN *v.* CURTIS, M. T. 1828. K. B. 3 *M. & Ry.* 389.

The jury are to say whether long undisturbed possession is a faculty.

A PEW in a chancel, claimed in right of a messuage, was shewn to have been erected on the site of old open seats in 1773, and no evidence of any faculty on search at the proper places.

The Court held, that the Judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say, whether upon the evidence merely of long undisturbed possession any faculty existed; and a new trial was refused.

And see Griffiths v. *Matthews*, 5 *T. R.* 296; *and Stocks* v. *Booth*, 1 *T. R.* 428.

Physician*.

See tits. *Apothecary—Surgeon.*

COLLINS *v.* CARNEGIE, T. T. 1834. K. B. 3 *N. & M.* 703; S. C. 1 *Ad. & E.* 695.

A Scotch diploma does not confer a right to practise in England without a license from the College of Physicians.

A DOCUMENT was produced in evidence purporting to be a diploma from the university of St. Andrews, and a witness was called, who stated, that he went to a place which he was told was St. Andrews, taking with him the diploma, where he had seen three persons, who he was informed were three of the professors, one of whom was the librarian, who acknowledged their signatures to that diploma. He was also shewn by the librarian the book of acts, in which was an entry, (of which he produced an examined copy), conferring the degree of M. D. on the plaintiff, as also the seal of the university, corresponding with that on the diploma.

The Court held, that that was sufficient evidence of the conferring

* The stat. of 14 & 15 Hen 8, c. 5, appointing and regulating the College of Physicians, is a public act. (*College of Physicians* v. *Harrison*, T. T. 1828, N. P., 1 M. & M. 191; S. C. 9 B. & C. 524; post, p. 155).

the degree by the university of St. Andrews; but such degree, however, granted by a Scotch university, does not confer on the person to whom it is granted a right to practise as a physician in England, without license from the College of Physicians; and therefore, that a plaintiff could not maintain an action, in which he alleged he was a physician, against a person who denied that he was such, for slander of him as such physician, upon the above evidence.

COLLEGE OF PHYSICIANS *v.* HARRISON, E. T. 1829. K. B. 9 *B. & C.* 524; S. C. 1 *M. & M.* 191.

In debt on the 10 Hen. 8, for practising without a license, if the defendant succeeds he is entitled to costs.

IN debt on 10 Hen. 8, for penalties for practising within &c., without the license of the College of Physicians—

The Court held, that the defendant having succeeded was entitled to his costs, inasmuch as the plaintiffs would have been entitled to recover them, upon the principle that a right being vested in that corporation, and the withholding it and compelling them to sue for it being an injury for which damages might be recovered, costs would follow.

Pilot.

See also tits. *Ship and Shipping.*

M'INTOSH *v.* SLADE, E. T. 1827. K. B. 6 *B. & C.* 657.

The owners are exempt from liability when a pilot is on board*.

THE vessel stopped at a point short of the place where she ought to have gone in the first instance in the regular delivery of the cargo, and afterwards took on board a pilot and proceeded thither, during which time the damage arose by the neglect or default of the pilot.

The Court held, that it was not to be deemed a new change of moorings within the exception of the Local Pilot Act, 6 Geo. 4, c. 125, s. 63; and that the master being obliged to leave a pilot on board, the owners were exempt from liability for such injury.

HAMMOND *v.* BLAKE, T. T. 1830. K. B. 10 *B. & C.* 424.

The pilot is bound to produce his license.

THE 6 Geo. 4, c. 125, s. 66, imposing a penalty on a pilot acting in that capacity without first producing his license—

The Court held, that the master of a ship was not subject to the penalty under sect. 58, for refusing to employ him, the license not having been produced by the pilot, although not demanded.

* The provisions of the General Pilot Act, 6 Geo. 4, c. 125, s. 53, do not extend to the case of a ship having on board a pilot licensed under the 41 Geo. 3, c. 86, s. 6, (Newcastle-upon-Tyne Pilot Act). (*Dodds* v. *Embleton*, H. T. 1829, K. B., 9 D. & R. 27).

In an action against the captain and owner of a steam-vessel for an injury resulting from the improper management of the vessel, if it appear that a pilot had the control, such pilot is not a witness for the defendant, without a release, although the defendant himself was on board at the time. (*Hawkins* v. *Finlayson*, H. T. 1828, N. P., 3 C. & P. 305; sed vide 6 & 7 Vict. c. 85).

BEILBY *v.* SCOTT, T. T. 1840. Ex. *7 M. & W.* 93.

A steamer towing a coasting vessel cannot be considered contravening the Pilot Act.

THE master of a coasting vessel hired a steam-tug bonâ fide for the purpose of towing her up the river.

The Court held, that although the employing such power necessarily devolves the selection of the course and management of the ship, yet, the object being solely the employment of the moving power, the party so employed is not within the meaning of the 6 Geo. 4, c. 125, s. 70, as a pilot, and that he could not be deemed to have the charge or conduct of the vessel, and that no penalty was therefore incurred under sect. 70; held also, that such penalty might be sued for by a common informer, the consent of the Trinity House or Warden respectively being necessary only in case of the pilots licensed by them, and not with reference to pilots not within the jurisdiction of either.

REX *v.* JUSTICES OF MIDDLESEX, E. T. 1817. K. B. *6 M. & Selw.* 279.

Under the Pilot Act, 52 Geo. 3, c. 39, the appeal need not be at the next sessions*.

THE Pilot Act, 52 Geo. 3, c. 39, giving an appeal to a party convicted within three calendar months after such conviction, upon giving ten days' notice of such appeal to the persons appealed against, and within fourteen days next after such notice entering into a recognizance—

The Court held, that he was not bound to appeal to the next immediate session after the conviction, but that he had three calendar months to signify his intention of appealing.

Plays†. See tit. *Theatre*.

Pleading in Action of Debt‡.

See particular titles, according to the subject-matter and form of action.

UNDERHILL *v.* ELLICOMBE, T. T. 1825. Ex. *1 M. & Y.* 450.

Declaration in debt does not

THIS was an action of debt by surveyors of highways to recover the amount of composition money duly assessed upon the defendant in

* A commitment under the 6 Geo. 4, c. 125, s. 70, (the Pilot Act), is defective, if it does not allege the offer by a licensed pilot to have been made to the defendant, or in his presence; stating the offer in the words of the act is insufficient. (*Reg.* v. *Chaney*, H. T. 1838, B. C., 6 D. P. C. 281).

† The 2nd section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50*l.* on persons performing or causing to be performed plays, &c., without letters patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83. Proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances, and if he caused the performances, it is not material whether he did so as the agent of others or not. (*Parsons* v. *Chapman*, M. T. 1831, N. P., 5 C. & P. 33).

‡ The 11 Geo. 4 & 1 Will. 4, c. 70, s. 11, and 3 & 4 Will. 4, c. 42, are in pari materiâ, and to be construed together:—Held, therefore, that the rules of pleading founded thereon extend only to matters of practice, over which the Courts "have a common jurisdiction," and not to real actions. (*Miller* v. *Miller*, H. T. 1835, C. P., 3 D. P. C. 408.

lie for composition money duly assessed in lieu of statute duty*.

lieu of statute duty. The plaintiffs had a verdict, subject to the opinion of the Court upon a special case.

Per Cur.—We think that the plaintiffs cannot maintain the action. This is a claim given by statute, and the same statute which creates it prescribes a particular remedy for its enforcement; therefore, it appears to us that no other can be resorted to. The 13 Geo. 3, c. 78, s. 34, which imposes the charge, and ascertains its amount, provides "that, in default of payment, the money shall be levied by distress and sale of the goods and chattels of the person or persons refusing to pay, in such manner as the forfeitures for neglect to perform the statute duty are thereby authorized to be levied and raised;" and the 72nd section directs the penalties and forfeitures to be levied by distress and sale, by warrant under the hand and seal of a justice of the peace. The 34 Geo. 3, c. 74, in repeating the same provisions for the payment of a composition, points out a remedy for raising it, exactly to the same effect.

Pleas.

See, also, particular titles, according to the subject-matter and form of action; and post, tit. *Statute, general Issue by.*

I. RELATIVE TO THE FORM AND REQUISITES OF A PLEA.

(*a*) Of the commencement, p. 158.

(*b*) Matter of defence, p. 159.

(*c*) Conclusion, p. 162.

(*d*) Signing, p. 162.

II. RELATIVE TO SEVERAL PLEAS, p. 162.

III. RELATIVE TO SHAM AND FRIVOLOUS PLEAS, p. 165.

IV. RELATIVE TO DEFECTS IN, WHEN AIDED, p. 165.

* The decree of a colonial Court may be enforced in an action of debt. (*Henley* v. *Soper*, E. T. 1828, K. B., 8 B. & C. 16; S. C. 2 M. & Ry. 153).

Where the declaration in debt contained the words "undertook and agreed," in the quantum meruit count:—Held good; also immaterial that the aggregate of the sums claimed amounted to more than the debt claimed, the sum stated in each count being wholly immaterial. (*Gardner* v. *Bowman*, E. T. 1834, K. B., 4 Tyrw. 413).

A declaration in debt demanded 60*l.*, and contained six counts for 10*l.* each; and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside. (*Risdale* v. *Kelly*, E. T. 1831, Ex., 1 C. & J. 410; S. C. 1 Tyrw. 337).

Since the new rules in debt for goods sold and delivered:—Held, that upon a plea that the defendant is not indebted, &c., an agreement for a credit not expired cannot be given in evidence, but should be specially pleaded. (*Edmunds* v. *Harris*, M. T. 1834, K. B., 4 N. & M. 182. But see ante, p. 21).

It is no objection to an interlocutory judgment, that it is signed in an action of debt. (*Mackenzie* v. *Gayford*, H. T. 1836, B. C., 5 D. P. C. 403).

V. RELATIVE TO THE TIME FOR PLEADING.

(*a*) Within the four or eight days, p. 166.

(*b*) Where time is granted, p. 167.

(*c*) In the vacation, or easter or other holidays, p. 168.

VI. RELATIVE TO THE RULE TO PLEAD, p. 168.

VII. RELATIVE TO THE DEMAND OF PLEA, p. 169.

VIII. RELATIVE TO THE DELIVERY OF, 170.

IX. RELATIVE TO PLEADING ISSUABLY, AND BEING UNDER TERMS, p. 170.

X. RELATIVE TO PLEADING AFTER AMENDMENT, AND EFFECT OF SUMMONS TO AMEND, p. 172.

XI. RELATIVE TO SIGNING JUDGMENT FOR WANT OF, p. 173.

XII. RELATIVE TO ADDING AND WITHDRAWING PLEAS, p. 175.

XIII. RELATIVE TO ABIDING BY PLEAS, p. 175.

XIV. RELATIVE TO STRIKING OUT AND SETTING ASIDE PLEAS, p. 176.

I. RELATIVE TO THE FORM AND REQUISITES OF A PLEA.

(*a*) Of the commencement. See also ante, tit. *Actionem non.*

Hodson *v.* Pamel, H. T. 1839. Ex. 7 *D. P. C.* 208; S. C. 4 *M. & W.* 373.

A plea dated before delivery is not a nullity*.

The time for pleading expired on the 1st November. On the morning of the 2nd, before the opening of the office, the defendant's attorney delivered a plea dated the 1st. Upon this the plaintiff signed judgment.

Per Cur.—All writs are required to bear date on the day when they issued, but if they are tested on a different day they are treated

* By Rule H. T., 4 Will. 4, the plea shall be intitled of the day, month, and year, and contain no formal commencement, and no venue in the body.

A plea dated and delivered on the 23rd of October is a mere nullity; and it seems that the plaintiff may sign judgment as for want of a plea; but, if he applies to the Court to set it aside, he must come within four days from the expiration of the time to plead. (*Mills* v. *Brown*, M. T. 1840, B. C., 9 D. P. C. 151). But, a plea having been demurred to, because it was dated 1832 instead of 1833, the Court ordered the demurrer to be set aside with costs. (*Neal* v. *Richardson*, T. T. 1833, Ex., 2 D. P. C. 89).

Where the plea suggested that the party acting as attorney had been appointed by the commissioners of his Majesty's Customs solicitor for the Customs, on behalf of his Majesty, and that he acted under such directions in this behalf:—Held, that the plea could not be treated as a nullity, although it did not otherwise appear that the cause concerned matters of revenue, it sufficiently disclosing that he was within the statutory exemptions of 9 Geo. 4, c. 25. (*West* v. *Taunton*, H. T. 1830, C. P., 6 Bing. 404; abridg. ante, tit. *Attorney*).

as irregular only, and not as void. Here the plea is right upon the face of it, and the wrong date is in the nature of a mistake.

RATTON *v.* DAVIS, E. T. 1841. Q. B. 1 *Gale & D.* 21; *supporting* WEEDING *v.* ALDNISH, H. T. 1839. Q. B. 9 *A. & E.* 861.

IN debt, for work, and on an account stated, pleas, 1st, nunquam indebitatus; 2nd, as to part, a set-off; and, 3rd, as to other part, payment. On special demurrer to the two latter pleas—

Omission of actionem non, no ground of demurrer;

The Court held, that the formal commencement of actionem non, and conclusion with prayer of judgment, were unnecessary.

HARVEY *v.* GRABHAM, E. T. 1837. K. B. 5 *A. & E,* 61.

A DECLARATION contained two counts. A plea commenced by a general allegation that plaintiff ought not to have or maintain his aforesaid action thereof against the defendant: then followed matter expressly confined to the first count, "with a verification and prayer of judgment, whether the plaintiff ought to have or maintain his aforesaid action thereof." The record then went on thus:—"And, as to the second count, &c." with matter expressly confined to the second count, and verification and prayer of judgment as before.

and its improper introduction does not vitiate.

Held, that the first plea was a plea pleaded to the first count only, though informally, introducing the actionem non, &c., was good on demurrer to the rejoinder.

CORBETT *v.* SWINBURN, M. T. 1837. Q. B. 3 *N. & P.* 551.

PLEAS, as to £——, part &c., payment and acceptance after action commenced in satisfaction of the debt and all damages, wherefore plaintiff ought not further to maintain &c.

The plea should be in "further" maintenance after action brought.

The Court held the plea to be properly drawn in further maintenance of the action.

(*b*) MATTER OF DEFENCE.

MARGETTS *v.* BAYS, H. T. 1836. K. B. 6 *N. & M.* 228; S. C. 4 *A. & E.* 489.

DEBT for work and labour. Pleas, first, non assumpsit; second, that the said supposed debt in the said declaration mentioned [if any such there be] did not, nor did any part thereof, accrue to the plaintiff within six years before the day of the commencement of the suit. Special demurrer to second plea, shewing for cause that it does not confess and avoid, or traverse or deny the causes of action &c.

Plea, "supposed cause of action," bad*.

Lord *Denman*, C. J.—It has been decided that the "said supposed cause of action, if any there be," is not a sufficient confession and avoidance, and judgment must therefore be for the plaintiff. Leave to amend, on payment of costs.

* A plea containing two defences is not the less a double plea because one of the defences is badly pleaded. (*Stevenson* v. *Underwood*, T. T. 1838, C. P., 6 D. P. C. 737; S. C. 6 Scott, 402; S. C. 4 Bing. N. S. 655; S. P. 2 G. & D. 386).

DYSON *v.* WOOD, M. T. 1824. K. B. 3 *B. & C.* 449; S. C. 5 *D. & R.* 295.

So, a plea is bad which merely denies an allegation applicable to the evidence in the cause, and not denying the fact alleged.

ACTION of trespass. Plea, justifying under a judgment and process of a court baron, the plaintiff replied, that there was not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court.

The Court held the plea bad on general demurrer as putting in issue an immaterial fact, not denying that judgment was given in the court below, but merely that it was not capable of being verified by a particular species of proof.

MEE *v.* TOMLINSON, M. T. 1836. K. B. 4 *A. & E.* 489.

The plea should shew to how much of each count it applies,

PLEA of payment. Declaration, that defendant was indebted to plaintiff in 200*l.* for work and labour, 200*l.* for money paid, and 200*l.* on an account stated, in consideration whereof defendant promised to pay the said several monies; breach, non-payment; damages 200*l.* Plea, as to 20*l.*, parcel of 56*l.* 11*s.* 8*d.*, parcel of the monies in the first two counts mentioned, and as to 20*l.* parcel of 56*l.* 11*s.* 8*d.*, parcel of the money in the last count mentioned, that the said 20*l.*, so found due on an account stated, was the same sum of 20*l.* parcel of the monies in the first two counts mentioned; and that the said two sums of 20*l.* each were one and the same debt of 20*l.*, and not other and different debts of 20*l.*; and that defendant paid, and plaintiff accepted the same in satisfaction of the promises, so far as they related to the same debt of 20*l.*, and of all damages sustained by reason of the non-performance. On special demurrer—

The Court held, 1st, that the identity might be so averred; 2nd, that the plea was bad, for not shewing to how much of the sum in the first count, and to how much of the sum in the second count, it was pleaded.

LORYMER *v.* VIXEN, T. T. 1837. C. P. 3 *Bing. N. S.* 222; S. C. 4 *Scott*, 190.

or, to what particular items.

A DECLARATION on a charter party, with a count for the hire of a ship, and a count on an account stated, assigned several breaches: 1st, that defendant did not load a cargo; 2nd, did not pay 200*l.* for four months' freight; 3rd, did not pay 200*l.* found to be due on the account stated, to the damage of plaintiff of 300*l.* Plea, as to 476*l.* 14*s.* 7*d.*, parcel of the sums in the declaration mentioned, payment before action of that sum, in satisfaction of that sum, in satisfaction and discharge of all damages as to that sum.

The Court held the plea insufficient, it not shewing in respect of what particular items of the plaintiff's demand the payment had been made.

WOOD *v.* FARR, H. T. 1839. C. P. 7 *D. P. C.* 263; S. C. 5 *Bing. N. S.* 247.

If a plea only answers part, it should be demurred to.

IN debt for 150*l.*, on three counts for 50*l.* each, plea, actio non, because the defendant had paid various sums amounting to 50*l.*

The Court held the plea only demurrable, and that it was irregular to sign judgment of nil dicit as to part not answered by the plea.

PUTNEY *v.* SWAN, M. T. 1836. Ex. 5 *D. P. C.* 296; S. C. 2 *M. & W.* 72.

THE declaration contained one count on a bill of exchange against the acceptor, and another on an account stated, the defendant pleaded only that he did not accept the bill of exchange:—Held, that the plea was bad on special demurrer, as it purported to answer the whole declaration.

as to a declaration on a bill and an account stated, plea, that the defendant did not accept the bill.

VERE *v.* GOLDSBOROUGH, M. T. 1834. C. P. 1 *Bing. N. S.* 353; S. C. 1 *Scott*, 265.

ON motion to set aside a judgment, it appeared that the defendant pleaded several pleas, each applicable to a particular count in the declaration only, without expressly limiting each plea to the count which it was intended to answer. The plaintiff, under the Rule 9 of H. T., 4 Will. 4, which declares, "that all pleas, unless otherwise expressed, shall be taken as pleaded respectively in bar of the whole action," signed judgment.

The Court held, that the plaintiff could not treat the pleas as a nullity, and sign judgment, but should have demurred specially.

An omission in a plea to refer to the particular count is only a ground of demurrer.

KILMER *v.* BAILEY, M. T. 1839. Ex. 7 *D. P. C.* 803; S. C. 5 *M. & W.* 382.

IN an action for the balance of an account, (36*l.* 2*s.* 4*d.*), the defendant pleaded, inter alia, a set-off, and payment into Court of 5*s.*, which was taken out of Court, and the jury gave a verdict for 35*l.* 17*s.* 4*d.*, which, with the 5*s.*, made up the amount claimed by the plaintiff's particulars of demand; but they found, also, that the defendant had paid a sum of 29*l.* 17*s.* 3*d.*, and had a set-off to the amount of 16*l.* 10*s.* 7*d.*

The Court held, that the pleas being severally pleaded to the whole, and not covering the whole demand established in evidence, the defendant was not entitled to have the verdict entered for him.

Unless the defendant's pleas establish a defence covering the whole demand, he is not entitled to the verdict.

FENN *v.* GRAFTON, M. T. 1835. C. P. 2 *Bing. N. S.* 617.

IN case, the defendant pleaded that the plaintiff was not possessed. Upon an issue, whether the plaintiff was possessed of the messuage and premises, &c., in which the injury was committed—

The Court held, that proof of his being in the separate occupation of part of the house was sufficient to support it.

On a plea of possession, if plaintiff be possessed of part, it is sufficient.

JONES *v.* JONES, H. T. 1840. Ex. 6 *M. & W.* 84.

IN debt on a promissory note, plea, that it was given on an agreement for the purchase of a cottage and land, and no memorandum of the sale in writing. Replication, that the defendant paid down part of the purchase-money, and gave the note for the remainder, and was let into possession, and that the plaintiff was always ready and willing to execute a conveyance. On special demurrer to the replication, for multifariousness—

The Court held, that the plea was itself bad on general demurrer, not shewing any refusal to convey.

Plea to an action on a note, that it was given for the purchase of a cottage, must shew a refusal to convey.

ANON., M. T. 1825. K. B. 7 *D. & R.* 511.

Defendant's misnomer does not make plea a nullity.

ON motion to set aside a judgment—

The Court held, that a misnomer as to defendant's Christian name, in his plea, is not a ground for treating it as a nullity, and that plaintiff had no right to sign judgment as for want of a plea.

(*c*) CONCLUSION*.

(*d*) OF SIGNING. See ante, tit. *Counsel's Signature*, and particular titles, according to subject-matter.

II. RELATIVE TO SEVERAL PLEAS.

REG. GEN., T. T. 1826. C. P. 3 *Bing.* 635.

Inconsistent pleas not allowed, unless accompanied by affidavit of the necessity;

ON a rule calling on a defendant to elect which of several inconsistent pleas he would abide by, in an action on an award, the motion being arranged by consent of parties, the Court gave out that, for the future, inconsistent pleas should not be allowed, unless accompanied with an affidavit to shew that they were necessary to the justice of the case.

DUERR *v.* TRIEBUER, M. T. 1834. C. P. 3 *D. P. C.* 133; S. C. 1 *Bing. N. S.* 266; S. C. 1 *Scott*, 102.—S. P. WILKINSON *v.* SMALL, E. T. 1835. B. C. 3 *D. P. C.* 564.

or amounting to a substantial defence.

ASSUMPSIT for work and labour, and money paid. Rule to plead, 1st, the general issue as to the whole; and 2nd, that the demand for work and labour done arose out of an illegal wager as to the price of tallow. On shewing cause against the rule—

Per Cur.—The Rule of H. T., 4 Will. 4, distinctly says, that several pleas shall be allowed, if distinct grounds of answer or defence are intended to be established in respect of each; and that is the case here. The word "inconsistent" was studiously kept out of the Rules, for the subject was discussed, and it was felt that there might be cases in which pleas might be inconsistent with each other, and sustain substantially different defences. The object had in view was to prevent the same defence being pleaded in different forms.

LEGGE *v.* BOYD, M. T. 1840. C. P. 9 *D. P. C.* 39; S. C. 2 *Scott, N. S.* 1; S. C. 1 *M. & G.* 898.

The general issue by statute

THE defendant pleaded the general issue, "by statute," and also various several pleas, in order to raise the same question.

* A plea must still conclude with a verification or to the country, notwithstanding the Rules of the H. T. 4 Will. 4. (*Snow* v. *Stevens*, T. T. 1834, Ex., 2 D. P. C. 664; S. C. 1 C., M. & R. 26); but pleas need not conclude with a verification unless they contain affirmative matter; therefore, a plea of the Statute of Limitations without a verification is good on special damurrer; (*Bodenham* v. *Hill*, M. T. 1840, 8 D. P. C. 862; S. C. 7 M. & W. 274); and an informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try; the objection can only be taken advantage of on special demurrer. (*Smith* v. *Smith*, E. T. 1836, Ex., 5 D. P. C. 84).

Per Cur.—Whenever a statute gives the power of giving several matters in evidence under the general issue, the statute comprehends all the power given by the statute of Anne. The rule by which

cannot be pleaded with a special plea*.

* The Court, in the exercise of its discretion, under stat. 4 Anne, c. 16, s. 4, will not give leave to plead not guilty "by statute," together with a special plea, although such plea raise a defence independent of the statute. (*Ross* v. *Clifton*, E. T. 1841, Q. B., 11 Ad. & E. 631; S. C. 9 D. P. C. 1033). But the defendant may plead several pleas, shewing different legal conclusions from the same facts. (*Curry* v. *Arnott*, H. T. 1839, C. P., 7 D. P. C. 249; S. C. 5 Bing. N. S. 224; S. C. 7 Scott, 172). As in assumpsit by indorsee against acceptor, the defendant allowed to plead, 1st, non-acceptance; 2nd, non-indorsement; 3rd, that plaintiff was jointly liable; 4th, drawer and defendants in partnership, and acceptance by one in fraud of the others; 5th, indorsement by drawer, with notice after the bill due; 6th, indorsement to plaintiff for accommodation; 7th, the bill drawn for accommodation; 8th, similar plea, and indorsement after becoming due; and, lastly, that the bill was drawn, accepted, and indorsed by fraud and covin and misrepresentation. (*Bulley* v. *Foulkes*, M. T. 1839, B. C., 7 D. P. C. 839). And in replevin, justifying the taking of cattle damage feasant in the locus in quo, as the soil of A., and a like awowry as to the soil of B., are allowable under the new Rules, H. T. 4 Will. 4. (*Evans* v. *Davies*, E. T. 1838, Q. B., 3 N & P. 646). But two pleas to an action of trespass quare clausum fregit, the one justifying under a custom for all times to make trenches in lands for conveying water for the better working of a stannary, and the other alleging the custom to be upon making compensation for the injury done, cannot be pleaded together, being within the Rule of H. T., 4 Will. 4. (*Bastard* v. *Smith*, H. T. 1836, K. B., 1 N. & P. 242; S. C. 5 Ad. & E. 827). And, in an action against the sheriff for a false return of nulla bona, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead together two pleas, one traversing the allegation that the defendant seized the goods of the debtor, and the other setting forth dates, &c. of the act of bankruptcy and fiat; the former having been prior, the latter subsequent, to the seizure. (*Wright* v. *Jameson*, M. T. 1837, Ex., 3 M. & W. 44). So, in case for injury done to the plaintiff's reversionary interest, defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be tenant in the declaration was not tenant. The defendants were a company incorporated by act of Parliament, which enabled them to plead the general issue, and give in evidence that the act complained of was done in pursuance of the authority of that act. The Court refused to allow the pleas together with the general issue. (*Fisher* v. *Thames Junction Railway*, T. T. 1837, Ex., 5 D. P. C. 773). So, in an action for not accepting railway shares, the Court refused to allow the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no such note. (*Sykes* v. *Reeves*, H. T. 1838, Ex., 6 D. P. C. 384). So, where by a railroad act it was enacted, that, in an action for calls, it should be sufficient for the company to prove that the defendant was a proprietor of shares at the time of the calls for which the action is brought. The Court refused to allow the defendant in such an action to plead, in addition to never indebted and not a proprietor, that defendant had forfeited his shares before the calls in question were made; or that he had forfeited his shares and ceased to be a proprietor after the calls, and before action brought. (*London and Brighton Railway Company* v. *Fairclough*, H. T. 1840, C. P., 8 D. P. C. 278; S. C. 6 Bing. N. S. 270; S. C. 8 Scott, 540). So, where, by the terms of a railway act, the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the calls was given according to the act, unless the defendant should prove that he had paid the full amount of his subscription, defendant having pleaded to an action for calls, that he was not indebted and was not a proprietor, the Court refused to allow him to add pleas, that due notice of the calls was not given; that no time or place was appointed for payment; that the calls were made for purposes other than those warranted by the act; that they were made after deviations in the line; and that fewer shares were allotted than the act required. (*London and Brighton Railway Company* v. *Wilson*, M. T. 1839, C. P., 8 D. P. C. 40; S. C. 6 Bing. N. S. 137; S. C. 8 Scott, 347; S. P. *Eastern Counties' Railway* v. *Hebblewhite*, T. T. 1840, Q. B., 4 P. & D. 246).

Where, in an action against defendant as a public officer of a company, he pleaded (together with other pleas) his bankruptcy, and that he ceased to be a

the Courts have been guided appears to be this, that they consider the general issue, when pleaded "by statute," as the mode taken by the defendant of shewing that he intends to give evidence under the statute, and not by pleading the facts specially: it would be giving the defendant an unfair advantage if he had the power of doing both.

WILKES *v.* ATTLEY, T. T. 1838. Q. B. 3 *N.* & *P.* 99.

There can be no rule to plead several matters pending a motion to set aside a judgment*.

ON the day the time for pleading expired the defendant delivered pleas, with a summons for leave to plead several matters, returnable in two days, and the plaintiff returned the pleas, and signed judgment, as for want of a plea—

The Court, on an affidavit of merits, set aside the judgment, without costs; but held, that, pending the rule for setting aside the judgment, an order obtained by the defendant to plead several matters was irregular, and set it aside.

public officer before action brought, the Court ordered such pleas to be struck out, upon an undertaking by the plaintiff that he would not take out execution against the defendant personally. (*Wood* v. *Marston*, M. T. 1839, Ex., 7 D. P. C. 865).

Where, to debt on simple contract in an inferior court, not of record, the defendant pleaded both the general issue and set-off, and the plaintiff treated the latter plea as a nullity, replied only to the first, and obtained a verdict and judgment:—Held, on a writ of false judgment, that, as the defendant could not plead double, and the first plea was complete in itself, the second was surplusage, and the plaintiff was justified in taking no notice of it; and the judgment was affirmed. (*Chitty* v. *Denby*, E. T. 1835, K. B., 4 N. & M. 842; S. C. 3 Ad. & E. 319).

* By Rule T. T. 1 Will. 4, it is ordered, "That no rule to shew cause or motion shall be required, in order to obtain a rule to plead several pleas, but that such rules shall be drawn up on a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of facts of the intended pleas: provided that no summons or order shall be necessary in the following cases, that is to say, where the plea of non assumpsit, or nil debet, or non detinet, with or without a plea of tender as to part; a plea of the Statute of Limitations; set-off; bankruptcy of the defendant; discharge under the Insolvent Act; plene administravit; plene administravit præter; infancy, or coverture, or any two or more of such pleas shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof."

By Rule, H. T. 2 Will. 4, "If a party pleads several pleas, avowries, or cognizances, without a rule to plead for that purpose, the opposite party shall be at liberty to sign judgment."

But no rule to plead several matters is required where the pleas are added under a Judge's order. (*Monck* v. *Shenstone*, M. T. 1836, C. P., 3 Scott, 661). And a plea of nunquam indebitatus as to all except a certain sum, and a tender of that sum, does not require a rule to plead several matters; and where, in such a case, the plaintiff signed judgment for want of a rule, it was held that the defendant did not waive the irregularity by attending the taxation of costs, and making no objection. (*Archer* v. *Garrard*, M. T. 1837, Ex., 6 D. P. C. 132; S. C. 3 M. & W. 63). Where a plaintiff has consented to a rule to plead several matters, the Court will not entertain an application to set aside any of these pleas. (*Howen* v. *Carr*, M. T. 1836, Ex., 5 D. P. C. 305). A summons to plead several matters, returnable on the day after the time for pleading expires:—Held to operate as a stay of proceedings at the hour when the judgment office opens, and as if a summons for further time to plead had been taken out, and judgment signed at the opening of the office therefore irregular. (*Wells* v. *Secret*, H. T. 1834, B. C., 2 D. P. C. 447). So, a summons to plead several matters, taken out on the day the time for pleading expires, returnable on the following day at eleven o'clock:—Held, that, until disposed of, it operated as a stay of proceedings, although the time for pleading had been enlarged. (*Spenceley* v. *Shouls*, E. T. 1837, K. B., 5 D. P. C. 562).

SOUTH-EASTERN RAILWAY COMPANY *v.* SPROTT, E. T. 1839. Q. B. 8 *D. P. C.* 493; S. C. 3 *P. & D.* 110; S. C. 11 *Ad. & E.* 167.

ON motion to strike out pleas—

The motion should be to rescind the Judge's order.

The Court held, that, upon a Judge's order for pleading several pleas, made a rule of Court, the course is to move to rescind the order, and not to strike out the pleas, and the latter rule, not having been drawn up "on reading the declaration," on affidavit of the pleas being identical, was discharged.

III. RELATIVE TO SHAM AND FRIVOLOUS PLEAS.

BELL *v.* ALEXANDER, E. T. 1817. K. B. 6 *M. & Selw.* 133.

ON motion to set aside a judgment—

If a plea be clearly a sham plea, judgment may be signed*;

The Court held, that the plaintiff cannot take upon himself to sign judgment as for want of a plea, unless the inference is irresistible that the plea is a *sham* plea.

SMITH *v.* BACKWELL, E. T. 1827. C. P. 4 *Bing.* 513; S. C. 1 *M. & P.* 138.

ON motion for leave to sign judgment as for want of a plea—

but it must be palpably so†.

The Court refused to allow judgment to be signed on the ground

* As where a judgment recovered was pleaded before the cause of action accrued. (*Phillips* v. *Brine*, E. T. 1817, K. B., 6 M. & S. 134).

† However, if a defendant is under terms to plead issuably, and he pleads nunquam indebitatus to a declaration containing counts on bills of exchange, as well as for goods sold and delivered, the plaintiff may treat the plea as a nullity, and sign judgment as for want of a plea. (*Sewell* v. *Dale*, H. T. 1840, B. C., 8 D. P. C. 309). So, where a plea raising different issues, as, release by a deed lost or destroyed, was sworn to be false, the Court allowed judgment as for want of a plea. (*Smith* v. *Hardy*, T. T. 1832, C. P., 8 Bing. 435). And where after a frivolous and non-issuable plea, plaintiff signed judgment as for want of a plea, a rule to set aside the judgment was discharged with costs. (*Blackburn* v. *Edwards*, E. T. 1839, Q. B., 10 Ad. & E. 21). But the Court refused to treat a plea of a former judgment recovered as false, and allow the plaintiff to sign judgment as for want of a plea.—Semble, they will only interfere where the plea raises issues requiring different modes of trial, or is so drawn as to put the plaintiff to expense or delay. *Young* v. *Gardiner*, E. T. 1825, C. P., 8 Moore, 437).

Where the plea was a sham plea, and a demurrer to the replication only filed for delay, the Court refused to set aside the concilium for the last day of term, although the demurrer book had not been delivered on stamp (formerly required) to the defendant's clerk in Court, nor any books to the two junior barons. (*Gent* v. *Vandermoolen*, H. T. 1824, Ex., 13 Price, 247; see 10 Price, 340).

Where the defendant pleaded a plea offering several defences to the action, and raising several issues, both of fact and law, without leave to plead several matters, the Court confirmed an order, made by a Judge at chambers, for setting it aside, without an affidavit of its falsehood. (*Balmanno* v. *Thompson*, M. T. 1839, C. P., 8 D. P. C. 76; S. C. 6 Bing. N. S. 153). And the Court will set aside pleas which are frivolous or absurd, though the defendant be not under terms of pleading issuably. (*Horner* v. *Keppel*, E. T. 1839, Q. B., 2 P. & D. 234; S. C. 10 Ad. & E. 17). In an action by indorsee of a bill of exchange against the acceptor, a plea, that the drawer did not pay its amount to the acceptor, as the consideration of the acceptance, was held frivolous; and the Court made absolute, with costs, a rule for signing judgment as for want of a plea. (*Knowles* v. *Burwood*, E. T. 1839, Q. B., 2 P. & D. 235; S. C. 10 Ad. & E. 19).

of the falsehood of a plea of delivery of twenty pipes of wine in satisfaction, that being the only plea, and nothing improper on the face of it.

IV. RELATIVE TO DEFECTS IN, WHEN AIDED.

DOWN *v.* HATCHER, E. T. 1839. Q. B. 10 *Ad. & E.* 121; S. C. 2 *P. & D.* 292.

A plea of payment of a smaller sum, in satisfaction of a larger, is not cured by verdict*.

IN an action against an executrix for 200*l.*, plea, as to the residue of the said sums of money in the declaration mentioned, that after the making of the promise herein mentioned, and before the commencement of this suit, to wit, on &c., the defendant, Charlotte, as such executrix as aforesaid, paid to plaintiff and he received the sum of 6*l.* 10*s.*, in full satisfaction and discharge of the said residue of the sums of money in the declaration mentioned, and of all cause and causes of action in respect thereof. Replication, that the defendant, Charlotte, as such executrix as aforesaid, did not pay to plaintiff the said sum of money in manner and form as in the above plea alleged. Issue joined. After verdict, on motion for judgment non obstante veredicto—

The Court held, that a plea of payment of a smaller sum, in satisfaction of a greater, is bad, and not cured by verdict for the defendant.

V. RELATIVE TO THE TIME FOR PLEADING.

(*a*) WITHIN THE FOUR OR EIGHT DAYS.

PEPPERELL *v.* BURRELL, T. T. 1834. Ex. 1 *C., M. & R.* 372; S. C. 4 *Tyrw.* 809.

The defendant has the whole of the last day†.

UPON motion to set aside a judgment—

The Court held, that the defendant had the whole of the last day for delivering his plea, and judgment signed on that day was set aside as premature.

GLOVER *v.* WATMORE, T. T. 1826. K. B. 5 *B. & C.* 769; S. C. 8 *D. & R.* 607.

A summons for particulars sus-

THE defendant obtained a summons for better particulars four days before the time of pleading expired, and the plaintiff's attorney

* Where the Christian name in the declaration varied from that in the summons:—Held, that the objection must be taken within the time for pleading, and that, after judgment signed for want of a plea, it was too late to move to set it aside for such irregularity. (*Kitchen* v. *Brooks*, T. T. 1839, Ex., 5 M. & W. 522).

† Where a declaration is delivered on Saturday, the Sunday morning following is reckoned in the computation of time to plead. (*Shoebridge* v. *Irwin*, M. T. 1837, Ex., 6 D. P. C. 126).

If a plaintiff gives a greater number of days for pleading than by the practice of the Court is required, the defendant is entitled to avail himself of that greater number. (*Solomonson* v. *Parker*, M. T. 1833, B. C., 2 D. P. C. 405).

If the defendant neglects to enter his appearance to the writ within eight days, and the plaintiff enters an appearance for him, and then the defendant enters an appearance and gives notice of it, the plaintiff may proceed as if no such appearance had been entered, and may sign a judgment without a demand of plea. (*Davis* v. *Cooper*, T. T. 1833, Ex., 2 D. P. C. 135).

did not attend until the third summons, when the order was refused, and the time for pleading being expired, he signed judgment for want of plea.

pends signing judgment for want of a plea.

The Court held, that, the principal delay being created by the plaintiff's attorney, the judgment was signed too soon, and was therefore irregular.

REG. GEN. T. T. 1833. K. B., C. P., & Ex. 2 *N. & M.* 288; S. C. 1 *C. & M.* 865; S. C. 3 *Tyrw.* 985.

IT is ordered that in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules as in actions against defendants who are not in custody.

Prisoners must plead in same time as other defendants*.

(*b*) WHERE TIME IS GRANTED.

SIMPSON *v.* COOPER, T. T. 1836. C. P. 2 *Scott*, 840.—S. P. LANE *v.* PARSONS, M. T. 1836. C. P. 5 *D. P. C.* 359; S. C. 3 *Scott*, 652.

AN order obtained upon terms of seven days' time to plead—

The time commences from the date of the order.

The Court held, that the seven days commenced from the date of the order, and not from the expiration of the four days in which he was originally required to plead.

CLARK *v.* ALLBUT, H. T. 1836. Ex. 4 *D. P. C.* 684; S. C. 1 *T. & G.* 71.

IN an action in the Common Pleas, for a libel, to which a justification was pleaded, the plaintiff having recovered a farthing damages, because a part of the libel was not covered by the justification, that Court granted a rule nisi for a new trial, on the ground that the justification was sufficient. An action having been brought in this Court by the same plaintiff, on the same libel, against another defendant—

Time indefinitely is never granted†.

* An attorney residing in London has only four days' time for pleading in a country cause, notwithstanding the Uniformity of Process Act, (2 Will. 4, c. 39). (*Lowder* v. *Lander*, T. T. 1837, B. C., 5 D. P. C. 684.—S. P. *Brenton* v. *Lawrence*, H. T. 1837, C. P., 5 D. P. C. 506).

† Where the plaintiff will not be materially prejudiced by the delay, the Court will, under certain circumstances, grant the defendant a year's time to plead. (*Hunt* v. *Barclay*, E. T. 1835, C. P., 3 D. P. C. 646). Where three months' time to plead is given generally, they are to be reckoned by lunar months, and not calendar months. (*Soper* v. *Curtis*, M. T. 1833, Ex., 2 D. P. C. 237).

Semble, that a summons for further time to plead, returnable at half-past ten in the morning "during Term," is a stay of proceedings, (*Bebb* v. *Wales*, H. T. 1837, Ex., 5 D. P. C. 458); although it is well known that a Judge does not attend at chambers at that hour. (*Byles* v. *Walter*, M. T. 1836, B. C., 5 D. P. C. 232).

If a defendant obtains an order calling upon the plaintiff to give security for costs, and directing that defendant shall have seven days to plead after such security given, and defendant, afterwards, and before security given, craves oyer, the time for pleading runs from the day when oyer is granted, if subsequent to the giving of security or rescinding of the order, and not in that case from the time when such security is given, or order rescinded. (*Catrell* v. *Macdonald*, T. T. 1836, K. B., 4 A. & E. 1004).

The Court refused to grant time for pleading indefinitely until a rule, pending in another case, was determined.

NIAS *v.* SPRATLEY, T. T. 1825. K. B. 4 *B. & C.* 386; S. C. 6 *D. & R.* 390.

After a Judge gives a fixed time no rule to plead need be given.

BY a Judge's order, dated 16th April, on payment of the debt and costs on or before two o'clock on 20th April, all further proceedings were to be stayed, defendant undertaking in default of payment to receive a declaration and plead thereto within the first four days of the next term. The debt and costs not being paid, the declaration was delivered, but the defendant not pleading within the time limited the plaintiff signed judgment without ruling him to plead.

Per Cur.—After a Judge's order directing the defendant to plead within a given time, if no plea is pleaded within that time the plaintiff may sign judgment without giving a rule to plead.

(*c*) IN THE VACATION, OR EASTER OR OTHER HOLIDAYS*.

VI. RELATIVE TO THE RULE TO PLEAD†.

PRYER *v.* SMITH, T. T. 1833. Ex. 1 *C. & M.* 855; S. C. 2 *D. P. C.* 114; S. C. 3 *Tyrw.* 820.

Need not be a new rule each term, even against a prisoner.

THE declaration against a prisoner was delivered in Easter, and judgment signed for want of plea in Trin. Term, without a fresh rule to plead as of the latter term.

The Court held the judgment regular.

* Where a party before the 10th August, having obtained a fortnight's time to plead, before the expiration of that time, obtained by consent a month's further time:—Held, that he was entitled to the remainder of the unexpired term so enlarged after the 24th October, and that judgment signed before was irregular. (*Trinder* v. *Smedley*, M. T. 1834, K. B., 3 D. P. C. 87). So, if the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of October. (*Wilson* v. *Bradslocke*, M. T. 1833, B. C., 2 D. P. C. 416). So, where, on the 5th of September, the defendant obtained a month's further time to plead, taking short notice of trial for the first sitting in term:—Held, that nevertheless the enlarged time did not commence until after the 24th October. (*Le Fevre* v. *Molineux*, M. T. 1837, Ex., 6 D. P. C. 153).

By Rule E. T., 2 Will. 4, it is ordered, "That the days between Thursday next before and the Wednesday next after Easter day shall not be reckoned or included in any rules, or notices, or other proceedings, except notices of trials or notices of inquiry in any of the courts of law at Westminster."

The time for pleading expired on Monday, the 25th May; the Queen's birthday fell on the 24th, but was kept on the 25th, on which days all the offices were closed:—Held, that a judgment signed on the opening of the office on the 26th was regular. (*Wilkinson* v. *Britton*, M. T. 1840, C. P., 1 Scott N. S. 348).

† A rule to plead is necessary in all cases, whether the defendant has appeared or not; but the objection held to be waived by a summons for time. (*Bolton* v. *Manning*, T. T. 1837, Ex., 5 D. P. C. 769).

The rule to plead need not be dated; consequently, an erroneous date does not vitiate. (*Wyatt* v. *Macdonald*, M. T. 1836, C. P., 3 Scott, 768).

When a rule to plead is given before notice of declaration, it is irregular; but the irregularity is waived by taking out a summons for time to plead; (*Pope* v.

OSBORNE *v.* PINNELL, E. T. 1834. C. P. 1 *Bing. N. S.* 320; S. C. 1 *Scott*, 277.

AFTER a summons for further time to plead, the defendant agreed to pay a part down, with costs of suit, and the remainder on a subsequent day; and having failed to do so, the plaintiff signed judgment, without any fresh rule to plead.

After compromise not performed, judgment may be signed without fresh rule to plead.

The Court held that he was entitled to do so, being remitted to his former status upon the defendant failing to perform the agreement.

WARNE *v.* BERESFORD, M. T. 1835. Ex. 4 *D. P. C.* 36; S. C. 1 *T. & G.* 230.

THE rule to plead was in a wrong plaintiff's name, and judgment was signed on the ground of the plea being defective.

An irregular rule to plead is as no rule.

The Court held, that the rule being as if no rule had been delivered, the judgment was irregular.

VII. RELATIVE TO THE DEMAND OF PLEA.

MARTIN *v.* MAHONEY, E. T. 1825. K. B. 5 *D. & R.* 609.

THE plaintiff demanded a plea before appearance, or the time for appearing had expired, and signed judgment for want of plea.

Cannot be demanded before appearance*.

The Court held it irregular.

Mann, T. T. 1837, Ex., 2 M. & W. 881); but there is no irregularity in entering a rule to plead, before notice of declaration but on the same day. (*Aitman* v. *Conway*, M. T. 1837, Ex., 6 D. P. C. 76; S. C. 3 M. & W. 71; S. P. *Chapman* v. *Davis*, T. T. 1840, C. P., 8 D. P. C. 831; S. C. 1 Scott, N. S. 431; S. C. 1 M. & G. 91). An appearance was entered for the defendant, and, after notice of declaration and demand of plea, he took out a summons for time to plead, which was not returnable until after the time for pleading expired. The plaintiff signed judgment:—Held, that a rule to plead was necessary, though an appearance had been entered for the defendant, but that the objection was waived by the summons for time. (*Bolton* v. *Manning*, T. T. 1837, Ex., 5 D. P. C. 769). Taking out a summons for time to plead is a waiver of a rule to plead. (*Nugee* v. *M'Donell*, E. T. 1835, B. C., 3 D. P. C. 579).

Formerly, after an amendment, whether made upon payment of costs or not, there must have been a new rule to plead. (*Addis* v. *Thomas*, M. T. 1829, C. P., 6 Bing. 236). And where a rule to plead has been entered in or of the term, or in the vacation, in which any amendment shall be allowed, no new rule to plead shall be necessary, but defendant shall plead within four days after such amendment, unless otherwise ordered by the Judge allowing the amendment. (*Reg. Gen.*, H. T. 1830, C P., 6 Bing. 347). But now, by Rule H. T., 2 Will. 4, no rule to plead required after amendment of declaration. Where the declaration and rule to plead were both in the vacation:—Held, that a new rule to plead of the term was unnecessary, in order to entitle the plaintiff to sign judgment for want of plea. (*Mould* v. *Murphy*, E. T. 1833, Ex., 2 D. P. C. 54). The rule to plead ought to be left at the office until after the defendant is served with notice of declaration filed. (*Bennett* v. *Smith*, M. T. 1836, C. P., 5 D. P. C. 353; S. C. 3 Bing. N. S. 305; S. C. 3 Scott, 673).

* By Reg. Gen., H. T. 2 Will. 4, the demand has twenty-four hours to run from the time of making it.

A demand of plea cannot be served on a defendant, not an attorney, by sticking it up in the King's Bench office. (*Anon.*, T. T. 1831, B. C., 1 D. P. C. 68).

Where a plea is a nullity, the plaintiff must nevertheless demand a plea before he signs judgment, and cannot treat it as a waiver of such demand. (*Hough* v. *Bond*, H. T. 1836, Ex., 1 M. & W. 314).

WILLETT *v.* WILSON, H. T. 1832. Ex. 2 *C. & J.* 356.

And where plaintiff appears, he may sign judgment without demand of plea;

A DECLARATION was delivered de bene esse, indorsed to appear and plead within eight days.

The Court held, that, having entered an appearance within that time, he was entitled to a demand of plea; and that the plaintiff might, by entering an appearance under the statute, sign judgment without demanding a plea.

BOOTH *v.* WHITEHEAD, M. T. 1839. C. P. 8 *D. P. C.* 8; S. C. 6 *Bing. N. S.* 144; S. C. 8 *Scott*, 340.

and judgment may be signed, though a promise not to do so without a demand, if an irregular plea be delivered.

IN an action by the indorsee against the indorser of a bill of exchange, the defendant having suggested that the indorsement was a forgery, the plaintiff, in order to afford time for inquiry, gave an undertaking that he would not sign judgment without four days' demand of plea. The defendant, on the 9th of November, without leave, and without waiting for such demand, delivered a double plea, and ruled the plaintiff to reply. On the 11th, the plaintiff signed judgment.

The Court held, that the judgment was regular.

VIII. RELATIVE TO THE DELIVERY OF*.

IX. RELATIVE TO PLEADING ISSUABLY, AND BEING UNDER TERMS†.

HUTHWAITE *v.* PHAIRE, E. T. 1840. C. P. 8 *D. P. C.* 541; S. C. 1 *Scott, N. S.* 43; S. C. 1 *M. & G.* 159.

A defective plea is not an issuable plea.

TO an action of covenant brought by plaintiff, as administrator of D., by virtue of letters of administration granted to him by the Archbishop of Dublin upon a deed of separation, whereby the defendant covenanted to pay his wife an annuity, which he likewise charged upon certain estates in Ireland. The defendant (who was under terms to plead issuably) pleaded that D., at the time of his death, was an inhabitant of, and commorant within, the city of Dublin, and had bona notabilia within the diocese of the Bishop of London.

The Court held, that the plea was not issuable, in not shewing, that at D.'s decease the deed sued on was within the diocese of London.

WILLIS *v.* HALLETT, E. T. 1839. C. P. 5 *Bing. N. S.* 465; S. C. 7 *Scott*, 474.

Plaintiff's bankruptcy before action is an issuable plea‡.

PLEA, that after the debt accrued, and before the action was commenced, the plaintiff became a bankrupt.

The Court held this to be an issuable plea.

* By Rule H. T., 4 Will. 4, all pleas are to be delivered.

† Where a defendant is under terms to plead issuably, the plaintiff cannot reply double; and if he do, the Court will give leave to the defendant to assign it as cause of demurrer, and will allow it to be argued. (*Gisborne* v. *Wyatt*, H. T. 1835, Ex., 3 D. P. C. 505).

‡ So, a plea to an action by the holder of a cheque, that the consideration for the making of it was money won by the third party of the defendant at hazard, in a

SERLE *v.* BRADSHAW, M. T. 1833. Ex. 2 *C. & M.* 148; S. C. 2 *D. P. C.* 289; S. C. 4 *Tyrw.* 69.

IN an action against an administrator, the defendant, when under an order to plead issuably, pleaded plene administravit and his bankruptcy, and the plaintiff signed judgment as for want of a plea.

The Court refused to set the judgment aside.

But, plene administravit and bankruptcy are not issuable.

BLACKBURN *v.* EDWARDS, E. T. 1839. Q. B. 10 *A. & E.* 21; S. C. 2 *P. & D.* 227.

IN debt on a common money bond, and one of the defendants, under terms of pleading issuably, pleaded that he and the other defendant were partners, and that, in consideration that he would at the request of the plaintiff and the other defendant dissolve such partnership, the plaintiff would forbear proceeding on the bond.

The Court held, this not an issuable plea, and bad on general demurrer; and a rule to set aside the judgment, signed as for want of plea, discharged with costs, although cause shewn in the first instance.

And, a plea that defendant, and A. and B. were partners, and in consideration that they would dissolve partnership, plaintiff agreed not to sue, is not an issuable plea.

BETTS *v.* APPLEGARTH, H. T. 1827. C. P. 4 *Bing.* 267.

ON demurrer—

The Court held, that a party, under terms of pleading issuably, is not precluded from demurring to any subsequent pleading; the order applying only to the existing state of the cause at the time of its issuing, and does not extend to cover subsequent errors.

"Under terms to plead issuably" does not apply to subsequent pleadings*.

CAVE *v.* MASSEY, H. T. 1825. K. B. 3 *B. & C.* 755; S. C. 5 *D. & R.* 624.

THE defendant obtained time to plead on the terms of giving judgment of the term; but he afterwards brought a writ of error.

To give a judgment of the

common gaming-house, is not an issuable plea within the meaning of an order to plead issuably. (*Humphreys* v. *Waldegrave*, T. T. 1840, Ex., 8 D. P. C. 768; S. C. 6 M. & W. 622).

So, the bankruptcy of one of several plaintiffs after action brought is not an issuable plea. (*Staples* v. *Holdsworth*, M. T. 1837, C. P., 6 D. P. C. 196; S. C. 4 Bing. N. S. 144; S. C. 5 Scott, 432). So, it is not an issuable plea that plaintiff was discharged under the Insolvent Act, and the cause of action vested in his assignee. (*Wettenhall* v. *Graham*, T. T. 1838, C. P., 6 Scott, 603). But in an action for wrongfully refusing to permit plaintiff to appraise goods distrained, the defendant being under terms to plead issuably, pleaded that plaintiff was tenant to defendant, and that goods were taken as a distress for arrears of rent:—Held, an issuable plea. (*Sealey* v. *Harris*, H. T. 1839, Ex., 7 D. P. C. 195).

The defendant, in a country cause, obtained time to plead upon the usual terms of pleading issuably, &c. The order was served, but the defendant's attorney, on receiving it, wrote to say, he would not avail himself of it; through delay by the post, the plaintiff's attorney did not receive the letter until after the time for pleading had expired:—Held, that the defendant was bound by the terms of the order. (*Griffin* v. *Dickenson*, M. T. 1839, Ex., 7 D. P. C. 860).

* The order for further time to plead upon the terms of "pleading issuably, rejoining gratis, &c.," applies to the plea only, and not to the subsequent proceedings. (*Woodman* v. *Goble*, H. T. 1838, Ex., 6 D. P. C. 371; S. C. 3 M. & W. 304).

If a plaintiff amend his declaration after a defendant has obtained time to plead on the usual terms of pleading issuably, &c., the latter is at liberty to demur specially to the declaration. (*Children* v. *Mannering*, M. T. 1839, B. C., 8 D. P. C. 120).

term means an available judgment.

Per Cur.—We are of opinion that the writ of error ought to be quashed. The judgment to be given in Michaelmas Term must mean an available judgment, upon which the plaintiff could take out execution. It was not necessary for him to stipulate that no writ of error should be brought.

BRETTAGH *v.* DECULLAN, H. T. 1825. Ex. 1 *M. & Y.* 106.

"All the usual terms" prohibits the change of venue.

A DEFENDANT, after having obtained three orders for time to plead in the usual terms, moved to change the venue from Middlesex to Lancaster, whereby the trial would have been postponed from the sittings in Hilary Term till the assizes.

But the Court refused the rule.

SAUTELL *v.* GILLARD, E. T. 1825. K. B. 5 *D. & R.* 620.

Under the terms of "pleading issuably," the defendant cannot demur specially*.

DEFENDANT being under terms of pleading issuably, put in a special demurrer, and plaintiff signed judgment as for want of a plea.

The Court held, that the plaintiff was entitled to do so.

X. RELATIVE TO PLEADING AFTER AMENDMENT, AND EFFECT OF SUMMONS TO AMEND.

FAGG *v.* BORSLEY, T. T. 1833. Ex. 1 *C. & M.* 770; S. C. 2 *D. P. C.* 107; S. C. 3 *Tyrw.* 905.

If no new plea, the former stands†.

THE defendant pleaded a plea before amending the declaration, with liberty to plead de novo.

The Court held, that, if the defendant did not plead de novo, the former plea will stand, if applicable to the amended declaration.

* Where the defendant, being under terms of pleading issuably, pleaded a plea clearly frivolous, and so late that the demurrer could not be argued in the term, the Court set it aside, and gave leave to sign judgment unless the defendant would undertake to go to trial at the first sittings, and pay the costs of amending and of the rule. (*Brown* v. *Austin*, T. T. 1835, Ex., 4 D. P. C. 161).

† Where a plaintiff obtains an order to amend his declaration, to which the defendant has demurred, and the latter at the same time obtains an order for time to plead, that time must be calculated from the time that the plaintiff amends, and not from the date of the order for time, although the latter order does not refer to the former. (*Davies* v. *Stanley*, E. T. 1840, B. C., 8 D. P. C. 433). So, if a plaintiff takes out a summons to amend his declaration, the defendant has a right to presume that it will be followed up by a peremptory summons, and therefore it will operate as a stay of proceedings for one day; consequently, where the time for pleading was out on the day on which the peremptory summons could be made returnable, a judgment signed for want of a plea on the morning of the next day was held irregular. (*Hodgson* v. *Caley*, H. T. 1840, B. C., 8 D. P. C. 318).

Amendment of a plea allowed, after the examination under an order of a witness going abroad, it appearing that the plaintiff had reasonable notice of the intended application before the examination had actually commenced. (*Hollingsworth* v. *Briggs*, H. T. 1836, C. P., 4 D. P. C. 643; S. C. 2 Scott, 794).

XI. RELATIVE TO SIGNING JUDGMENT FOR WANT OF.

See, also, particular titles according to subject-matter.

Ford *v.* Bernard, H. T. 1830. C. P. 6 *Bing.* 535.

Judgment may be signed if nil debet be pleaded in assumpsit*.

The defendant pleaded non-assumpsit in debt.

The Court held, that being a nullity it was not waived by the plaintiff afterwards calling for the particulars of a notice of set-off, which formed no part of the record; and the Court refused to set aside the judgment signed for want of plea, upon a mere affidavit of merits.

* By Rule H. T., 2 Will. 4, judgment for want of a plea may be signed after demand at the opening of the office in the afternoon of the day after that on which demand was made, but not before.

When a declaration is delivered on Saturday, the Sunday morning following is reckoned in the computation of time. (*Shoebridge* v. *Irwin*, M. T. 1837, Ex., 6 D. P. C. 126). And where declaration delivered on the 9th, indorsed to plead in four days, and plea demanded on the same day, and judgment signed for want of plea at one o'clock on the 14th:—Held irregular. (*Blundell* v. *Hansom*, H. T. 1837, Ex., 5 D. P. C. 457; S. C. 2 M. & W. 243, overruling *Kemp* v. *Fyson*, M. T. 1834, Ex., 3 D. P. C. 265, infra). So, where the declaration was delivered on the 7th to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—Held, that judgment for want of a plea signed at ten o'clock on the 15th was regular. (*Tate* v. *Bodfield*, M. T. 1834, Ex., 3 D. P. C. 218). So, in an action by the indorsee against the indorser of a bill of exchange, the defendant having suggested that the indorsement was a forgery, the plaintiff, in order to afford time for inquiry, gave an undertaking that he would not sign judgment without four days' demand of plea. The defendant, on the 9th of November, delivered a double plea, and ruled the plaintiff to reply: on the 11th, the plaintiff signed judgment:—Held, that the judgment was regular. (*Booth* v. *Whitehead*, M. T. 1839, C. P., 8 D. P. C. 8; S. C. by name of *Gould* v. *Whitehead*, 6 Bing. N. S. 144). And in an action on two bills of exchange by indorsee against acceptor, plea, as to one bill, no consideration between drawer and defendant; as to the other, no consideration paid by plaintiff to defendant. The Court set aside the pleas, with costs, and allowed plaintiff to sign judgment, although defendant was not under terms. (*Knowles* v. *Burward*, E. T. 1839, Q. B., 10 Ad. & E. 19; S. C. 2 P. & D. 235).

The 3 & 4 Will. 4, c. 42, s. 43, having passed after the Rule of Hil. T., 2 Will. 4, is to be considered as a qualification of it. Where a declaration was filed on the 24th December, with notice to plead in four days, and judgment was signed on the 29th:—Held irregular. (*Wheeler* v. *Green*, H. T. 1839, Ex., 7 D. P. C. 194). And an order for seven days' time to plead was obtained on May 15th. On the 22nd, pleas were delivered, but irregular in several respects, and on the evening of that day the plaintiff signed judgment as for want of a plea, the Court set aside the judgment as having been signed too early. (*Pepperell* v. *Burrell*, T. T. 1834, Ex., 2 D. P. C. 674; S. C. 1 C., M. & R. 372). So, where a declaration was delivered on the 4th of August, with notice to plead in four days:—Held, that judgment could not be signed for want of plea until the afternoon of the 9th. (*Kemp* v. *Fyson*, M. T. 1834, Ex., 3 D. P. C. 265). So, where, after demurrer to the declaration, the plaintiff obtained leave to amend, but discovered that the demurrer had not been signed by counsel, he signed judgment for want of plea, the Court set it aside, with leave to the plaintiff to amend on payment of costs. (*Pocock* v. *Shell*, H. T. 1839, C. P., 7 Scott, 229).

If a plaintiff treats a plea as a nullity, and signs judgment as for want of a plea, he so treats it for all purposes, and cannot afterwards say that it was merely irregular, so as to be a waiver of the demand of a plea. (*Hough* v. *Bond*, E. T. 1836, Ex., 1 M. & W. 314).

If a defendant, who is an attorney, really appears in person, but in point of form as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served. (*Kerrison* v. *Wallingborough*, E. T. 1836, B. C., 5 D. P. C. 564).

AMPTHILL *v.* SEMPLE, H. T. 1832. Ex. 2 *C. & J.* 358; S. C. 2 *Tyrw.* 312.

A plea delivered before judgment signed is in time*.

A PLEA was in fact delivered before judgment signed, and the plaintiff's attorney afterwards, with knowledge of that having been done, signed judgment.

The Court held the judgment irregular, and set it aside, with costs to be paid by the attorney.

HARRISON *v.* SMITH, H. T. 1829. K. B. 9 *B. & C.* 243.

The office cannot be opened to sign judgment.

ON motion to set aside a judgment—

The Court held, that, although the office may be opened as a dies non juridicus for the convenience of suitors, yet the Court cannot do any judicial act on such a day, and that, therefore, judgment signed for want of a plea on that day was irregular.

STAFFORD *v.* NICHOLLS, T. T. 1838. C. P. 6 *Scott*, 577; S. C. 4 *Bing. N. S.* 693.

Judgment signed for want of plea set aside on payment of costs†.

AFTER the time for delivery of plea had expired, and the plaintiff's attorney's clerk had left an order to proceed to sign judgment, the defendant's attorney called with the plea, but judgment was signed in ignorance of it.

The Court refused to set aside the judgment but on terms of payment of costs.

* So, where the judgment was signed in term for want of a plea, where the plea was delivered before eleven o'clock of the day after that on which the time for pleading expired:—Held, irregular. (*Leigh* v. *Bender*, T. T. 1835, Ex., 4 D. P. C. 201). So, a plaintiff has no right to sign judgment for want of a plea before the time for pleading is out, although a bad plea may have been delivered. (*Dakins* v. *Wagner*, E. T. 1835, B. C., 3 D. P. C. 535; S. P. *Nolleken* v. *Severn*, H. T. 1832, Ex., 2 C. & J. 333; S. C. 2 Tyrw. 304: S. P. *Smith* v. *Rathbone*, H. T. 1836, B. C., 5 D. P. C. 401: S. P. *Macher* v. *Billing*, M. T. 1834, Ex., 3 D. P. C. 246; S. C. 1 C., M. & R. 577; S. C. 4 Tyrw. 812). Where, after obtaining a week's further time to plead, the defendant took out several summonses for further time, the last returnable on the day after the week's time expired, but no order taken on either:—Held, that the plaintiff was entitled to sign judgment on that day. (*Bass* v. *Cooper*, T. T. 1837, Ex., 2 M. & W. 310).

† The rule, that an application to set aside a judgment by default on affidavit of merits must be made within a reasonable time, applies as well to a prisoner as other persons. (*Fife* v. *Bruere*, M. T. 1835, C. P., 4 D. P. C. 329). The Court refused to set aside an interlocutory judgment (which had been irregularly signed three years ago) upon payment of costs, though proceedings by scire facias had been only lately commenced. (*Lewis* v. *Browne*, E. T. 1835, Ex., 3 D. P. C. 700). Where an administrator, after time to plead upon the usual terms, pleaded a judgment recovered since the action commenced, omitting to aver that he had no assets ultra, it being sworn that he had admitted in his possession sufficient to cover the judgment and also the plaintiff's demand, the Court refused to allow him to amend, and gave leave to sign judgment as for want of plea. (*Roberts* v. *Wood*, E. T. 1835, Ex., 3 D. P. C. 797).

The eighth rule of H. T. 4 Will. 4, held not to apply to pleas by executors of judgments recovered. (*Power* v. *Fry*, M. T. 1834, C. P., 3 D. P. C. 140).

Judgment signed in November, 1833, plaintiff took no further step till January, 1835, when he gave a term's notice of executing a writ of inquiry. In April notice of executing it for the 28th of May was served on the defendant in person. On the 27th of May the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not attended by the plaintiff's attorney. At four o'clock the writ of inquiry was executed. On the same day a second sum-

BARROW *v.* CROFT, T. T. 1825. K. B. 4 *B. & C.* 388; S. C. 6 *D. & R.* 388.

A JUDGMENT had been marked at the time by the officer, and regularly docketed.

Judgment for want of a plea should be regularly carried in.

The Court refused to take it off the file, though not carried in for twenty-four days after the term in which it was obtained, but, disapproving of such neglect, discharged the rule without costs.

XII. RELATIVE TO ADDING* AND WITHDRAWING PLEAS.

PALMER *v.* DIXON, E. T. 1825. K. B. 5 *D. & R.* 623.

THE defendant, after pleading in abatement, put in a plea of judgment recovered, without obtaining leave to withdraw the former plea.

The former plea must be withdrawn before another delivered†.

The Court made a rule absolute for judgment as for want of plea.

XIII. RELATIVE TO ABIDING BY PLEAS ‡.

mons was taken out, returnable the next day, which was attended and dismissed, and an application was then made to the Court to set aside the judgment and subsequent proceedings for irregularity:—Held, that the defendant was too late; and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry. (*Roberts* v. *Cuttill*, T. T. 1835, Ex., 4 D. P. C. 204).

* The commissioners of sewers having obstructed a water-course, which plaintiff claimed a right to navigate, made him an offer of compensation, which he refused, and sued for more. The defendants by their pleas denied the right and also the obstruction. After abortive attempts during four years to proceed with a reference of the action, the Court refused the commissioners leave to plead a third plea, which would defeat the action, unless the commissioners renewed and the plaintiff refused the offer of compensation made at first. (*Medley* v. *Pritchard*, M. T. 1839, C. P., 8 Scott, 684; S. C. 6 Bing. N. S. 442).

A plea, that the defendant was not detained in custody, as alleged in the declaration, was held not to be such a vexatious and frivolous plea as to deprive the defendant of his right to add the general issue, there being an affidavit of merits. (*Rix* v. *Kingston*, M. T. 1831, Ex., 3 D. P. C. 159). A plea was allowed after the plaintiff had replied, and the cause was in the paper under special circumstances. (*Jones* v. *Roberts*, T. T. 1834, Ex., 2 D. P. C. 698).

† By Rule H. T., 2 Will. 4, the defendant shall not be at liberty to waive his plea without leave of the Court, or a Judge. And by the same Rule, where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose, before the officer of the Court.

The Court refused to allow a plea, which had been annexed to an affidavit in support of a motion disposed of, to be taken off the file, to enable the party to make his defence in another proceeding. (*Price* v. *Seeley*, T. T. 1840, B. C., 8 D. P. C. 653).

‡ Even before the Rule H. T., 2 Will. 4, supra, a party under terms of pleading issuably must adhere to his plea; where, therefore, he had pleaded specially:—Held, that he could not afterwards strike it out and plead the general issue, although he had not been ruled to abide by his plea. (*White* v. *Givens*, E. T. 1817, K. B., 6 M. & Selw. 415).

XIV. RELATIVE TO STRIKING OUT AND SETTING ASIDE PLEAS*.

EDWARDS *v.* GREENWOOD, M. T. 1838. C. P. 5 *Bing. N. S.* 476.

The Court will not strike out a plea if doubtful.

ON motion to strike out a plea which was irregular, it was contended that the party has a right to have it set aside.

The Court said, as it was doubtful whether the plea was bad or not, they would not strike out the plea.

Plene Administravit. See tit. *Executors and Administrators.*

Poaching. See tit. *Game.*

Poison†. See tits. *Manslaughter—Murder.*

Police‡. See, also, tits. *Constable—Imprisonment—Trespass.*

Polygamy§.

* The Court will not, upon affidavit, set aside a plea upon which issue may be taken. (*La Forest* v. *Langan*, H. T. 1836, C. P., 4 D. P. C. 642). And in an action by indorser against acceptor, defendant pleaded that he had no notice of the indorsement; that he did not promise to pay; and that plaintiff had not paid the whole consideration. The Court refused to set aside the plea as a nullity upon motion. (*Horner* v. *Keppel*, E. T. 1839, Q. B., 10 Ad. & E. 17; S. C. 2 P. & D. 234).

† If a servant put poison into a coffee-pot, which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee, this is a "causing the poison to be taken," within the stat. 9 Geo. 4, c. 31, s. 11, and the servant is therefore indictable under that act. Semble, that this is also an administering within that act, as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party. (*Rex* v. *Harley*, 1830, N. P., 4 C. & P. 369). If A. sends poison, intending it for B., with intent to kill B., and it comes into the possession of C., who takes it, but does not die, A. may be indicted for a capital offence on the stat. 9 Geo. 4, c. 31, s. 11. (*Rex* v. *Lewis*, 1833, N. P., 6 C. & P. 161). Semble, that, so far as the nature of the thing administered is concerned, the question, on an indictment under the stat. 9 Geo. 4, c. 31, s. 13, is a question of the intention of the party administering it, and not of the noxious or innoxious character of the article itself. (*Rex* v. *Coe*, 1834, N. P., 6 C. & P. 403).

‡ As to police of the metropolis, and regulations, and extension of powers, of courts of police, see 2 & 3 Vict. c. 47—71.

§ On an indictment for bigamy, if the first marriage was in Ireland, it is no objection that it was by license when one of the parties was under age, and that there was no consent of parents, unless such marriage was vacated on that ground within a year, under 9 Geo. 2, c. 11 (the Irish Marriage Act). (*Rex* v. *Jacobs*,

Poor.

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V. RELATIVE TO THE CHURCHWARDENS AND OVERSEERS. See, ante, tits. *Churchwardens—Overseers.*

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VII. RELATIVE TO THE RATE.

(*a*) OF THE PERSONS SUBJECT TO, p. 184.

(*b*) OF THE PROPERTY WHICH IS OR IS NOT RATEABLE, AND OF THE MAKING AND MODE OF RATING.

1. *In general.*

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2. *Almshouses,* p. 188.

3. *Bridges,* p. 188.

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8. *Common,* p. 193.

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1826, 1 Moo. C. C. 140). Semble, that the true construction of the 22nd section of 9 Geo. 4, c. 31, in relation to the offence of bigamy, is this: not that the party charged, to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage that the first wife had been alive during the seven years preceding; but that, to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive. (*Reg.* v. *Cullen*, 1840, C. C. C., 9 C. & P. 681). In an indictment for bigamy, the second wife was described as "E. C., widow." She was, in fact, not a widow, nor had she ever been represented or reputed to be so: —Held, a fatal variance. (*Rex* v. *Deeley*, 1831, O. B., 4 C. & P. 579).

VII. RELATIVE TO THE RATE—(*continued*).

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X. RELATIVE TO APPEALS. See post, tit. *Sessions.*

XI. RELATIVE TO THE SETTLEMENT OF. See post, tit. *Settlement and Removal of the Poor.*

XII. RELATIVE TO THE REMOVAL OF. See post, tit. *Settlement and Removal of the Poor.*

I. RELATIVE TO THE 4 & 5 WILL. 4, c. 76*.

II. RELATIVE TO THE POOR LAW COMMISSIONERS.

REG. *v.* POOR LAW COMMISSIONERS, *In re* ALSTONEFIELD, INHABITANTS OF, M. T. 1839. Q. B. 3 *P. & D.* 59.

The poor law commissioners

AN order of the poor law commissioners directed an auditor and clerk to a corporation of the poor, formed under Gilbert's Act,

* The 4 & 5 Will. 4, c. 76, amends the poor laws as relating to England and Wales. An analysis of the statute may be useful. The sections which apply to settlement and appeals will be inserted under tits. "*Sessions*," and "*Settlement and Removal of the Poor*," post.

By sect. 1. Appointment and removal of commissioners.

Sect. 2. Style of commissioners; who may sit as a board, with power to summon and examine witnesses, and call for production of papers on oath, or to substitute a declaration for an oath, but not to inquire into any title.

Sect. 3. To have a common seal. Rules, &c., purporting to be sealed with such seal, to be received as evidence.

Sect. 4. Commissioners to record their proceedings.

Sect. 5. Commissioners to make a general report to the secretary of state yearly.

Sect. 6. And to report proceedings to secretary of state where required.

Sect. 7. Power to appoint assistant-commissioners, and to remove same. Not more than nine to be appointed, without consent of Treasury.

Sect. 8. Commissioners not to sit in Parliament.

Sect. 9. Commissioners to appoint secretary, assistant-secretaries, clerks, and other officers.

Sect. 10. Appointment of commissioners, &c., to be limited to five years.

Sect. 11. Commissioners and assistant-commissioners to take oath. Form of oath. Notification of appointment of commissioners to be sent to clerks of the peace, and published.

Sect. 12. Commissioners may delegate powers to assistant-commissioners and revoke them. Assistant-commissioners may summon persons and examine them upon oath, or a declaration may be substituted for an oath.

Sect. 13. Persons giving false evidence guilty of perjury; refusing to attend, &c., guilty of misdemeanor.

Sect. 14. Reasonable expenses of witnesses to be paid, and by whom.

Sect. 15. Administration of relief to the poor to be under controul of the commissioners, who are to make rules and regulations for the management of the poor, and administration of the laws for their relief, &c. Commissioners may suspend or alter rules, &c.

Sect. 16. General rules to be submitted to secretary of state forty days before coming into operation. If disallowed by King in council during the forty days, not to come into operation. If disallowed afterwards, operation to cease on notice given.

Sect. 17. General rules to be laid before Parliament.

Sect. 18. Rules, orders, &c., to be sent to overseers, &c., before they shall come into operation. Publicity to be given to rules, &c., in manner directed by commissioners. Penalty on overseer, &c., neglecting to give publicity, &c. Disallowance of rule to be notified in like manner.

Sect. 19. No inmate of a workhouse obliged to attend any religious service contrary to his religious principles, &c.

Sect. 20. Orders or regulations of assistant-commissioners to be approved and sealed by commissioners.

Sect. 21. Powers of 22 Geo. 3, c. 83; 59 Geo. 3, c. 12, and of all other acts relating to workhouses, and to borrowing money, to be exercised under controul of commissioners, and to be subject to their orders. Commissioners, &c., to be entitled to attend local boards and vestry, but not to order the building or hiring of workhouses, except under limitations.

Sect. 22. No additions or alterations to be made to the rules contained in the

cannot direct the parish officers to return statistical information;

amongst other things, "to take measures for ensuring the prompt and correct return of all such statistical reports as might be required for the public service."

The Court held the order to go beyond the limits of the Poor Law Amendment Act, as subjects not connected with the relief and employment of the poor; and that the order being entire and invalid in the latter respect, it could not be supported.

schedule to 21 Geo. 3, c. 83, or in any other act, until confirmed by commissioners.

Sect. 23. Commissioners empowered to order workhouses to be built, hired, altered, or enlarged, with consent, &c.

Sect. 24. Sums to be raised for purposes of building workhouses, to be charged on poor-rates; not to exceed one year's amount of poor-rates.

Sect. 25. Power to order workhouses to be altered or enlarged, without consent, &c. Sums to be raised for such purposes not to exceed one-tenth of one year's rates, or 50*l*.

Sect. 26. Parishes may be united by commissioners. Each parish chargeable for its own poor.

Sect. 27. Justices may order out-door relief to aged and infirm persons wholly unable to work.

Sect. 28. When a union of parishes shall be proposed, commissioners to inquire the expense of poor belonging to each parish for three years preceding. Power for taking future averages.

Sect. 29. The like provisions in unions effected under local acts of incorporation, 22 Geo. 3, c. 83. Power for taking future averages.

Sect. 30. Parliamentary returns to be evidence of actual expense of poor to each parish.

Sect. 31. Repeal of 22 Geo. 3, c. 83, s. 5; and 56 Geo. 3, c. 129, part of s. 1, restraining parishes from contributing to workhouse at a greater distance than ten miles; and of 22 Geo. 3, c. 83, s. 29, limiting class of persons to be sent to workhouses.

Sect. 32. Power to dissolve, add to, or take from any union, and thereupon to make such rules as may be adapted to its altered state. Rights and interests of parishes, and claims on them, to be ascertained and secured. Dissolution or alteration not to affect rights of third parties, nor to take place without the consent of guardians of parish.

Sect. 33. United parishes may be one parish for purposes of settlement.

Sect. 34. Union may be one parish for purpose of rating, with consent of guardians. Agreement or counterpart for such rating to be deposited with clerk of the peace.

Sect. 35. Guardians to ascertain and assess value of property. Rates granted on such assessment to be allowed as poor rates.

Sect. 36. In such cases all expenditure for the poor to be in common. Expense of valuation. Proviso for consent of parishes not represented by guardian.

Sect. 37. No union to be so formed without consent of commissioners.

Sect. 38. Constitution and election of board of guardians for unions. No guardian to have power, except at a local board, unless otherwise directed by the commissioners. Guardians may be re-elected.

Sect. 39. The like for single parishes.

Sect. 40. At election of guardians votes to be taken in writing, and owners as well as occupiers to vote, 58 Geo. 3, c. 69. Scale of voting. Votes may be given by proxy. No rate-payer to vote unless rated one year.

Sect. 41. Elections of guardians, visiters, and other officers under the act 22 Geo. 3, c. 83, or any local act to be made according to the provisions of this act.

Sect. 42. Commissioners may make rules, &c., for present or future workhouses, and vary bye-laws already in force or to be made hereafter. Rules, &c., affecting more than one union, to be deemed general rules.

Sect. 43. Justices empowered to see bye-laws enforced, and to visit workhouses, pursuant to 30 Geo. 3, c. 49. The power given to justices, &c., to visit workhouses, reserved where commissioners' rules, &c., are not in force.

Sect. 44. Buildings taken for workhouses to be within the jurisdiction of the place to which they belong, though situated without.

Sect. 45. No lunatic, insane person, or dangerous idiot, to be detained in a workhouse more than fourteen days.

REG. *v.* POOR LAW COMMISSIONERS, E. T. 1839. 2 *P. & D.* 323. —S. C. *In re* CAMBRIDGE, E. T. 1839. Q. B. 10 *Ad. & E.* 131; S. C. 9 *A. & E.* 103.

SEVERAL parishes had been united for the purpose of the relief and employment of the poor. nor can they appoint a poor-rate collector.

The Court held, that the poor law commissioners had no authority, under the 46th section of the 3 & 4 Will. 4, c. 76, to direct the guardians of the union to appoint a collector of the rates in any of the parishes forming the union.

REG. *v.* HUNT, E. T. 1840. Q. B. 3 *P. & D.* 476.

IN this case— The commissioners may rescind and alter their former orders;

The Court held, that, under sect. 40, the commissioners have a right to issue, from time to time, orders prescribing the manner in which guardians are to be elected in any parish or union, and rescinding the provisions of former orders, respecting the manner of such election.

REG. *v.* POOR LAW COMMISSIONERS, *In re* NEWPORT UNION, E. T. 1837. K. B. 6 *Ad. & E.* 54.

ON a mandamus— and the Court will not inter-

The Court held, where the acts directed by the poor law commis-

Sect. 46. Commissioners may direct overseers and guardians to appoint paid officers for parishes or unions; and fix their duties, and the mode of appointment and dismissal, and the security, and regulate their salaries.

Sect. 47. Overseers to pass accounts quarterly. Recovery of balances. Surety not to be discharged.

Sect. 48. Masters of workhouses and parish officers to be under order of board, and removable by them.

Sect. 49. Contracts not to be valid unless conformable to the rules of commissioners.

Sect. 50. Repeal of 45 Geo. 3, c. 54, as to contracts.

Sect. 51. The penalty imposed by 55 Geo. 3, c. 137, on persons having the management of the poor being concerned in any contract, extended to persons appointed under this act.

Sect. 52. Commissioners to regulate the relief to able-bodied paupers and their families. Relief contrary to these regulations to be disallowed. But overseers may delay the operation of such regulations under special circumstances, and make report thereof to commissioners. If commissioners disapprove of delay, they may fix a day from which all such relief shall be disallowed. Cases of emergency.

Sect. 53. Repeal of 36 Geo. 3, c. 23, 55 Geo. 3, c. 137, ss. 3 & 4, and 59 Geo. 3, c. 12, ss. 2 & 5.

Sect. 54. No relief to be in future given except by board of guardians, &c. 1 & 2 Will. 4, c. 80. Any justice may give order for medical relief in dangerous illness.

Sect. 55. Masters of workhouses and overseers to keep registers.

Sect. 56. Poor persons liable for relief to wife or children, 43 Eliz. c. 2.

Sect. 57. Husband liable to maintain children of wife born before marriage.

Sect. 58. Such relief as commissioners may direct to be considered as loan.

Sect. 59. Power to justices to attach wages in hand of master or employer. Mode of proceeding against masters for recovery thereof.

Sect. 60. Repeal of so much of 43 Geo. 3, c. 47, as requires relief to be given to wives and families of substitutes, hired men, or volunteers of militia.

Sect. 61. Justices to certify that rules of commissioners have been complied with in binding poor children apprentices. Justice's power reserved as between master and apprentice.

Sect. 62. Power to overseers and rate-payers to raise money on security of rates for purposes of emigration.

See 6 & 7 Will. 4, c. 96, post, p. 184.

fere with their discretion.

sioners are clearly within their power, the Court will not entertain the question, whether they have exercised a sound discretion.

III. RELATIVE TO THE ASSISTANT COMMISSIONERS*.

IV. RELATIVE TO THE GUARDIANS†.

REG. *v.* ST. ANDREW'S, HOLBORN, T. T. 1839. Q. B. 10 *Ad. & E.* 736.

To a mandamus, the justices cannot return generally guardians not duly appointed.

To a mandamus to justices against guardians, to pay money pursuant to an order of the poor law commissioners, they returned that the guardians were not duly appointed.

The Court held, that the defect should have been distinctly set forth, the commissioners having clear authority to make the order; and the return therefore bad, and a peremptory mandamus awarded.

ELLIOTT *v.* MARTIN, M. T. 1834. Ex. 2 *M. & W.* 13.

The guardians of the poor may maintain an action on a bond for non-performance of a contract to supply bread, whereby great expense was incurred.

A BOND, set out on oyer, recited a contract entered into by the defendant with the guardians of a union, to supply bread of standard weight, as he should be required, to the poor of the parishes of the union, and that the guardians agreed to pay him the prices of the articles supplied, and of which a bill of particulars should be sent at the time, or within a month afterwards. The defendant also agreed that, in case the bread was not supplied when ordered, or, if supplied, was not of the proper quality, or was sent without a bill of particulars, the guardians might procure the bread elsewhere, and charge the defendant with the difference. The defendant pleaded general performance. The plaintiffs, in their replication, assigned three breaches: 1st, that the defendant, on a particular day, did not deliver bread according to order, but delivered loaves as and for loaves of a certain weight, which were deficient in weight; 2ndly, that he delivered loaves without a bill of particulars; 3rdly, that he delivered bread deficient in weight on another occasion. The defendant rejoined, that the first breach was before the contract; 2ndly, that the officer of the union had waived the delivery of the bill mentioned in the second breach, which was denied by the plaintiffs in their rebutter; and 3rdly, that he did not deliver the loaves as and for loaves of the weight specified in the third breach. At the trial, it was proved that the defendant delivered a quantity of loaves to the relieving officer at the poor-house, who weighed them, and, as they were found to be deficient in weight, returned them:—Held, that the Judge was warranted in leaving these facts to the jury, as evidence of a delivery of the loaves by the defendant; though, semble, the pleadings admitted the delivery, and only put in

* The 4 & 5 Will. 4, c. 76, s. 7, empowers the commissioners to appoint nine assistant commissioners, who are to have like powers, with the exception of making a general rule.

† See also 4 & 5 Will. 4, c. 76, ante, p. 179.

issue the sufficiency of the weight. The jury having found a verdict for the plaintiffs on the second issue—

The Court held, that it was a material issue, and that the plaintiffs were entitled to judgment thereon.

VI. RELATIVE TO UNIONS AND WORKHOUSES*.

REG. *v.* POOR LAW COMMISSIONERS, *In re* HOLBORN UNION, H. T. 1838. Q. B. 6 *Ad. & E.* 56; S. C. 3 *N. & P.* 77.

A part of a parish, made a distinct parish for ecclesiastical purposes, will be included in a union of the original parish.

THE parish of St. Andrew, Holborn, after the 13 & 14 Car. 2, c. 12, was divided into three liberties, each of which maintained its own poor separately. One of them was called the "Upper Liberty," and, under the 10 Anne, c. 11, a portion of it was assigned, for ecclesiastical purposes only, to the parish of St. George the Martyr, and the residue of that liberty was subsequently called Andrew-above-Bars. There continued, however, to be but one rate for the whole liberty, and there was no separation whatever in the relief of the poor of the two places. Various local acts had passed, which spoke of the united parishes of St. George and St. Andrew, and by one directors and governors of the poor were appointed, a distinct portion of whom were elected from each district.

The Court held, that there was not such a union of the parishes of St. George and St. Andrew-above-Bars as would, according to the 4 & 5 Will. 4, c. 76, s. 32, prevent the poor law commissioners from making an order for uniting the upper and lower liberties.

REG. *v.* POOR LAW COMMISSIONERS, *In re* WHITECHAPEL UNION, H. T. 1838. Q. B. 6 *Ad. & E.* 34; S. C. 2 *N. & P.* 8.

So, districts under a local act may be included;

ON a mandamus—

The Court held, that, under 4 & 5 Will. 4, c. 76, s. 26, the commissioners are empowered to include in unions any parish or district having a local act for managing the poor, although the guardians or trustees do not consent.

CANTRELL *v.* WINDSOR UNION, M. T. 1837. C. P. 4 *Bing. N. S.* 348.

but mere cottages, erected for charitable purposes, are not workhouses within the 4 & 5 Will. 4, and 5 & 6 Will. 4.

IN the year 1797, a piece of waste land was obtained by the churchwardens and overseers of a parish, pursuant to an inclosure act, whereon they built eight cottages, part of the cost of which was paid from a fund derived from benefactions given to the parish for particular churches, and the residue from payments of money made to the overseers under the inclosure act, which directed that such money should be applied to the relief of the poor, and accounted for as rates. Four of the cottages, and certain portions of the land adjacent thereto, were used for the reception and inhabitation of parish paupers; but the other four, and portions of the land at the backs thereof, were, from the time of their erection, let to independent labourers, who, at the time of the letting, were considered

* Purchase of land for poor-houses, under 4 & 5 Will. 4, c. 176, and 5 & 6 Will. 4, c. 69, amended by 1 Vict. c. 50.

likely to pay the rent as yearly tenants, at a rent not equal to the full value thereof, such rent being always collected, although the tenants occasionally received parish relief. The residue of the land was allotted by the parish officers to the labouring inhabitants of the parish, for the purpose of gardens, without any reference to their contributing or not contributing to the poor-rate, or receiving or not receiving parochial relief; and the cottages, and the fence round the whole of the land, were kept in repair with funds obtained from the poor-rates.

The Court held, that the four cottages so let to tenants, the pieces of land occupied therewith, and the allotments, did not come within the description of "workhouses," so as to entitle the guardians of the poor to take and use them for the purposes of the statutes 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69.

VII. RELATIVE TO THE RATE*.

(*a*) Of the persons subject to.

Rex *v.* Inhabitants of Wall Lynn, E. T. 1838. Q. B. 3 *N. & P.* 411.

The party in whose name the house is taken should be rated.

A. engaged to serve R. & Co. as a clerk and brewer, at an annual salary, with the privilege of living in a house in the brewery yard. He did live there for some time, but afterwards took another house in his own name, though the landlord stated that he considered R. & Co. to be his tenants. A lived in this house, but R. & Co. paid the rent and taxes, which were assessed upon A.

The Court held, that he was liable to be rated to the poor rate, in respect of the occupation of this latter house.

Rex *v.* Inhabitants of North Curry, M. T. 1825. K. B. 4 *B. & C.* 953; S. C. 6 *D. & R.* 424.

A firm carrying on trade in a parish in which none of the partners reside are not rateable;

Stock in trade of a partnership, where none of the firm resided in the parish, but the business was carried on by their foreman and servants, who resided in a part of the business premises situate within the parish—

The Court held, not to be rateable.

Rex *v.* Fryer, M. T. 1825. K. B. 4 *B. & C.* 961, n.

if rateable, as inhabitants only,

Partners carried on business at Poole, in the Newfoundland trade, where they had a counting-house and other rooms, but no one of the partners resided in Poole.

* By 4 & 5 Will. 4, c. 76, s. 35, guardians to assess and ascertain value of property. Rates grounded on such assessments to be allowed as poor rates.

By 6 & 7 Will. 4, c. 96, s. 1, all rates to be made on the net annual value of the property. Proviso.

Sect. 2. Rates to be made in a given form; nothing herein to prevent owners compounding for rates.

Sect. 3. Power to order new survey and calculation.

Sect. 4. Power for surveyors to enter and examine lands, &c. for purposes of surveys and plans.

Sect. 5. Power to take copies or extracts of rates granted. Penalty for refusing to permit.

Sects. 6 & 7 regulate the appeal. See post, tit. *Sessions.*

The Court held, that a rate upon the partners in respect of personal property, for which they were rateable only as inhabitants, could not be supported.

REX *v.* GOSSE, T. T. 1817. K. B. *7 B. & C.* 60.

THE sessions confirmed the rate, subject to the opinion of this Court, upon a case which stated that Gosse and two other persons carried on business in partnership, in the parish of St. James, in Poole. Gosse was the only partner resident in the parish, and he was rated in respect of the whole of the partnership personal property, in which he and his co-partners were equally interested, and not in respect of his third share only.

and, in respect of the partner's share who resides in the parish.

The Court held, that he could not be rated to the relief of the poor in respect of more than his share of the partnership personal property.

REX *v.* HULL DOCK COMPANY, M. T. 1824. K. B. *3 B. & C.* 516; S. C. *5 D. & R.* 359.

A LOCAL act (Hull) directed the rate to be levied by taxation of every inhabitant, and of all lands, houses, &c., "and all stocks and estates, according to their respective worths and value."

Under a local act (Hull), the owner of property need not be resident.

The Court held, that all personal property was thereby rateable, whether the owner was resident or not in Hull, and that persons having stock in trade there producing a specific property, though not resident, were rateable; so, owners and part owners of ships registered there, and trading to and from that port, and within it, at the time of the rate, although some of the owners were resident, others not; and that the appellants were not bound to show the amount of profit; but that the appellants were liable only to be rated upon such a sum as would, together with the rate, make up the whole amount of profits, and not upon the full amount of profits without deducting the rates. Lastly, that a lessee, whose under-tenants had been rated, but excused in respect of poverty, was not liable to be rated.

(*b*) OF THE PROPERTY WHICH IS OR IS NOT RATEABLE, AND OF THE MAKING AND MODE OF RATING.

1. *In general.*

1.—*Of the Property rateable, and of the Construction of Statutes.*

REX *v.* BIRMINGHAM GAS COMPANY, E. T. 1837. K. B. *1 N. & P.* 691.

A LOCAL act for regulating the poor of Birmingham directed a survey and valuation to be made of all houses, lands, tenements, and hereditaments, within the parish; and the poor rate to be made on that valuation.

All property must be rated according to the improved value*.

The Court held, that the value of steam-engines and other fixed machinery improving the value ought to have been taken into estimation in calculating the value of the buildings and premises to which they were attached.

* A local act (Hull), as to poor rates, is to be construed by itself, and not in relation to any other. (*Rex* v. *Hull Dock Company*, M. T. 1824, K. B., 3 B. & C. 516; S. C. 5 D. & R. 359).

REX *v.* ADEMES, E. T. 1832. K. B. 4 *B. & Ad.* 61.

Lands liable to be flooded must be rated accordingly.

LANDS were situated in a district liable to be flooded, and requiring protection at an occasional expense, for which the landowner was liable to sewers' rate.

The Court held, that they ought not to be rated as lands not requiring, nor subject to, such charge, the rate, though imposed on the occupier, being imposed with reference to the net average annual profit of the land.

REX *v.* LONDON GAS COMPANY, E. T. 1828. K. B. 8 *B. & C.* 54; S. C. 2 *M. & Ry.* 12.

he words in a local statute "free from all taxes and assessments," exclude poor rates.

AN act of Parliament passed in the 7 Geo. 3 created an exemption from "all rates and assessments whatsoever."

The Court held, that the exemption applied to the poor rate, the land-tax, and the sewers' rate, which were in existence at the time, though they were modified by subsequent acts, but that it did not apply to the house and window tax, which was a tax created afterwards.

MITCHELL *v.* FORDHAM, H. T. 1827. K. B. 6 *B. & C.* 274.

So, the words "free from all taxes and deductions, except the land-tax," include poor rates.

IN replevin, it appeared that, by an inclosure act, it was provided that a certain corn-rent, "free from all taxes and deductions whatsoever, except land-tax," should be issuing out of the lands to be inclosed, and other lands in the parish, and be paid to the rector, in lieu of all great and small tithes, &c.

The Court held, that this corn-rent was not liable to be assessed to the relief of the poor.

COLEBROOK *v.* TICKELL, E. T. 1836. K. B. 6 *N. & M.* 483; S. C. 4 *Ad. & E.* 916.

Incorporeal hereditaments not rateable*.

A LOCAL act imposed a rate on all persons occupying and enjoying any land, &c., tenement, or hereditament.

The Court held this to mean only such hereditaments as were capable of actual corporeal occupation, and not incorporeal hereditaments, for which the party would not have been liable to be rated under 43 Eliz. c. 2.

2.—*Of the making of the Rate.*

CORTIS *v.* KENT WATERWORKS COMPANY, T. T. 1827. K. B. 7 *B. & C.* 314.

To make a rate means a reasonable sum.

A PAVING act required the commissioners to settle and ascertain the amount to be raised for those purposes, and then to make and sign rates not exceeding the sum so settled and ascertained; and they having, at a meeting, resolved that it was deemed necessary to raise a sum not exceeding —— for the poor, &c., and a sum not exceeding —— for the highways:—Held, that such resolution

* Real property is to be rated according to its actual value, as combined with the machinery attached to it, without considering whether such machinery be real or personal property, so as to be liable to distress or seizure under a fi. fa., or whether it would belong to the heir or executor, landlord or tenant, at the expiration of the lease. (*Rex* v. *Guest*, M. T. 1838, Q. B., 2 N. & P. 663; S. C. 8 A. & E. 950).

might be construed to mean the smallest sum, which, in their discretion, they deemed necessary, and was sufficiently precise, and imported that it was necessary to raise money to that extent, provided it be a reasonable sum.

REG. *v.* INHABITANTS OF FORDHAM, M. T. 1839. Q. B. 3 *P. & D.* 96.

THE 6 & 7 Will. 4, c. 96, s. 2, enacts, "That every poor-rate shall contain an account of every particular set forth at the head of the respective columns in the form given by the schedule to that act; and that the churchwardens and overseers shall, before the rate is allowed by the justices, sign the declaration given at the foot of the said form, and otherwise the said rate shall be of no force or validity."

There cannot be concurrent rates; the rate must be made in conformity with the 6 & 7 Will. 4.

The Court held, that the words "of no force, &c.," applied solely to default in signing the said declaration, and that, as default in following the form given in the columns had not been made a ground of appeal by the statute, the sessions had no power to quash a rate for such default. On the argument of a case from sessions, it is too late to object that the order brought up varies from the order required by the certiorari. A concurrent rate, made for the same period as a former subsisting rate, is illegal: and the rate must be in conformity with the 6 & 7 Will. 4.

CORTIS *v.* KENT WATERWORKS COMPANY, T. T. 1827. K. B. 7 *B. & C.* 314.

AN act of Parliament directed that the sum necessary to be raised for the relief of the poor, &c., should be settled and ascertained, for which a rate should be made.

Before that statute, substantially complying with the terms of a statute was sufficient;

The Court held, that an adjudication, that a sum not exceeding a specified amount was necessary, and a rate at so much in the pound made and raised thereupon sufficiently satisfied the terms of the act.

REX *v.* TOMLINSON, H. T. 1829. K. B. 9 *B. & C.* 163.

THE sessions appeared to the Court to have been warranted in making a difference in the proportion of rating with reference to annual rent, between houses and collieries on the one hand and land on the other.

and the sessions might make a difference in the proportion of rating.

The Court said, as they could not say that the proportion fixed was not a right one, they must confirm the order; but, if the rate had been according to different proportions of the clear annual profit or value of the subject of occupation, it would have been otherwise: annual rent is not annual profit or value.

REG. *v.* EARL OF YARBOROUGH, E. T. 1840. Q. B. 3 *P. & D.* 491.

ON motion for a mandamus—

The Court held, that the justices to whom a rate is presented for allowance have no greater discretion to refuse it under 6 & 7 Will. 4, c. 96, than they possessed before that enactment. If, therefore, the overseers have signed the declaration mentioned in sect. 2, the justices cannot examine whether or not the rate has been made upon correct principles, and refuse allowance if they think otherwise.

Under 4 & 5 Will. 4, the allowance of justices is a mere nominal act.

REX *v.* GADSBY, E. T. 1837. K. B. 1 *N. & P.* 572.

One overseer may have a mandamus to direct all to make the rate,

ON motion for a mandamus—

The Court held, where one of two overseers refused to concur in making a poor rate, the other might apply for a mandamus, directed to all; and that the 1 Will. 4, c. 21, s. 6, makes no alteration as to the parties who may obtain the writ, but only with regard to the costs on such applications.

REX *v.* EDLASTON (OVERSEER, &c.), M. T. 1836. K. B. 1 *N. & P.* 20.

absolute in the first instance.

ON motion for a mandamus, it appeared that one set of parish officers refused to consent to a poor rate drawn up in the usual form by the other set, unless the latter described the locality of certain property therein, so as to operate as an admission against the interests of one of the latter—

The Court granted a mandamus to compel them to make a rate, and made it absolute in the first instance.

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2. *Almshouses.*

REX *v.* GREEN, E. T. 1829. K. B. 9 *B. & C.* 203.

Persons in almshouses, though they pay no rent, are rateable.

THE question for the opinion of the Court was, whether the appellants, the said almswomen, were liable to be rated for the relief of the poor of the said parish of Lee.

Per Cur.—The objects of a charitable foundation in the actual occupation of the almshouses for their own benefit, and liable to be removed at the pleasure of the patrons, are rateable in respect of such occupation.

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3. *Bridges.* See, also, post, div. *Tolls*, p. 201.

REX *v.* BARNES, T. T. 1830. K. B. 1 *B. & Ad.* 113.

Bridges are rateable on either side, if in different parishes.

A BRIDGE company occupied land in the parish as the foundation of the bridge, for passage over which tolls were payable, although in fact received at the toll-house on the opposite side of the river, in another parish—

The Court held, that they were rateable in respect of such occupation in both parishes.

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4. *Canals and Rivers*.*

REGINA *v.* LEEDS AND LIVERPOOL NAVIGATION COMPANY, H. T. 1838. Q. B. 2 *N. & P.* 540; S. C. 7 *Ad. & E.* 671.

The Leeds and Liverpool canal

BY the 10 Geo. 3, c. 114, the Leeds and Liverpool Navigation Company were empowered to purchase lands for the use of the navi-

* Where one statute authorizes the rating, and a subsequent one is silent on the subject, the canal is still rateable under the old statute. (*Rex* v. *Dudley Canal Company*, H. T. 1826, K. B., 6 D. & R. 466).

The proprietors of a navigable river not being able to be rated in respect of the

gation, and to make a canal, and to take tolls; and by clause 49 it was declared, that the tolls should be exempt from the payment of all rates, other than the land used for the purpose of the navigation would have been subject to if the act had not been made. By the 23 Geo. 3, c. 47, this act was repealed, but a similar clause was re-enacted. By the 59 Geo. 3, c. 5, which enabled the company to make another cut, extended all the exemptions in the former acts to the new works; and by sect. 17 it was enacted, "That all the lands, dwelling-houses, wharfs, quays, warehouses, lock-houses belonging to the company, should be rateable in the several parishes where respectively situate—the lands according to the quantity and quality, and the dwelling-houses, wharfs, quays, &c., according to the nature and respective uses, dimensions, and descriptions thereof, and should be charged in like manner as lands of a like quality, and dwelling-houses, warehouses, lock-houses, and other houses of a like and similar size, nature, dimensions, or descriptions in the respective parishes where situate, should be charged." The canal was made, and the company made basins and branches on other land purchased under the powers given by the acts, and on the sides thereof had wharfs at which vessels unloaded, which wharfs were a great public convenience, and were partly occupied by the company and partly let to tenants.

are rateable in respect of the land occupied by the basins, &c.

The Court held, first, that the land of the canal in the original line was rateable according to its value at the time of the making of the rate with reference to the value of the adjacent land, and not according to its value when the canal was first made, nor according to its value for the purposes for which it was used:—Held also, that they were to be assessed for the branches and basins not on the original line in the same manner.

REX *v.* CHELMER AND BLACKWATER NAVIGATION COMPANY, H. T. 1831. K. B. 2 *B. & Ad.* 14.

A CANAL act provided that the company should be rated for any lands taken or buildings erected, in pursuance of that act, in the same proportion as other lands and buildings adjoining to or lying near the same were rated.

A canal may be rateable according to the adjoining buildings.

The Court held, that they were to be rated according to the actual value of the lands and buildings which the company had in the particular parish, and not according to the actual productive value to the company.

REX *v.* MONMOUTHSHIRE CANAL COMPANY, T. T. 1835. K. B. 5 *N. & M.* 68; S. C. 3 *Ad. & E.* 619.

A LOCAL canal act enacted, that the company should not be rateable in respect of the tolls, &c., and in respect of the lands taken at a higher value or improved rent than other lands adjacent thereto, "are or shall for the time being be rated," and "as if the lands so taken had continued in their former state, and not been taken for the purpose of the undertaking"—

And where the criterion of rating is to be according to the adjoining land, the rate will be according to the fluctuating value.

The Court held, first, that the company were liable to be rated

water:—Held, not liable to be rated for the dams which held it up, and rendered it navigable. (*Rex* v. *Aire and Calder Navigation*, M. T. 1831, K. B., 3 B. & Ad. 139).

according to the fluctuating value of such adjacent land, and not merely at the value at the time when the act passed; and, secondly, that the value of such adjacent land was to be estimated according to whatever cause the increase might happen, and that the increase arising from the formatiom of the canal was not to be excluded.

REX *v.* INHABITANTS OF ST. PETER THE GREAT, E. T. 1826. K. B. 5 *B. & C.* 473; S. C. 8 *D. & R.* 331.

Under a particular statute the increased value may not be rateable.

A FORMER act enacted, that a canal company should be rated for their lands, "as the same would be rateable if they were the property of individuals in their natural capacity;" and a later act directed that they should be rated "in the same proportion as other lands, &c. lying near the same," and also gave the company power to buy lands exempt from rates, and shift the rates from the lands taken by them upon the lands of other proprietors.

The Court held, that the later act was not to be construed as repealing the former; and that both together were to be taken as exempting the company from being rated in respect of the increased value by being taken for the purposes of the canal.

REX *v.* REGENT'S CANAL COMPANY, E. T. 1827. K. B. 6 *B. & C.* 720.

In general the rate should be according to the real and not the improved value, and does not attach on a piece of ground in its natural state for which no rent is paid.

A LOCAL act provided, that the company should be rated for lands, buildings, wharfs, &c., according to their quantity and quality, in like manner as lands, &c. of a like quality in the respective parishes.

The Court held, 1st, that they were rateable for such, not in respect of their improved value, but of that which would have been the value if not used for the purposes of the canal; 2nd, that a piece of ground in its natural state, adjoining a basin of the canal and contiguous to a private timber yard used by the owner thereof, for which no acknowledgment or rent was ever paid to the company, although their rates were increased by the greater number of vessels which were thereby enabled to load and unload, could not be deemed a wharf within the meaning of the act, and was not therefore liable to be rated as such to the poor.

REX *v.* TRUSTEES OF DUKE OF BRIDGEWATER, H. T. 1829. K. B. 9 *B. & C.* 68.

The rent paid is the criterion,

ON a question as to the mode of rating a canal—

The Court held, that the proprietors of canals are within the same rule as all other occupiers of land; the rent at which the land will let is the criterion of the value of the occupation; the tonnage being the profit of the land occupied by them.

REX *v.* CHAPLIN, H. T. 1831. K. B. 1 *B. & Ad.* 926.

if not on a beneficial lease.

CANAL commissioners, having borrowed a large sum on mortgage, and, being unable for want of further funds to complete it, demised the navigation, the lessee undertaking to complete it and pay the interest on the mortgage; and, upon the validity of the lease being questioned, a fresh lease for the then remaining part of the term was

granted under further powers obtained, and there was a power in default of the interest being paid to require the toll collector to pay over the tolls to the mortgagee.

The Court held, that, the lease not being beneficial, the interest was to be deemed a rent to be rated thereon, and not on the produce of a particular year, the rent appearing to be a fair average value of the navigation.

REX *v.* OXFORD CANAL COMPANY, M. T. 1829. K. B. 10 *B. & C.* 163.

Canal companies are to be rated according to the distance they pass in each parish, but are entitled to deduct for the expense of repairs and of collecting tolls.

A CANAL act provided that the O. Canal Company should receive certain tolls, except for coals, carried along a certain part of it from its junction with the C. canal, and as a compensation for which it should be entitled to certain tolls carried along a portion of the latter canal; there was also a provision for compensation to be received from the G. J. Canal Company, with which and the C. canal it communicated.

The Court held, that in rating the O. Canal Company in the respondent parish on which the point of junction with the C. canal was, they were liable to be rated, 1st, for the mile tonnage of merchandize (not being coals) passing along the canal in that parish, and to be according to the distance in each parish; 2ndly, that, in fixing the amount of such rates upon the calculation of the profits, an allowance was to be made for a proportion of the reasonable expense of supplying water, for the poor rates, for the expense of repairs, and of collecting the toll, &c.

REX *v.* INHABITANTS OF MILTON, H. T. 1829. K. B. 9 *B. & C.* 810.

Where a toll is imposed instead of mileage, the rate is to be paid in the parish only where the toll is situated.

A CANAL was connected with the river S. by locks, and the canal supplied by water-engines with water from the river, and by the act enabling the proprietors to erect them, a toll of one penny per ton was imposed for passing thereon, in lieu of the mileage toll imposed by the original act for passing along the canal.

The Court held, that the annual profits of the canal were rateable only in the parish where they accrued, and were not to be divided amongst the parishes through which the canal passed; and that such annual profit was to be estimated at the rent which a tenant could give, he paying poor rates, and the annual expenses of repairs, and other outgoings necessary for making the occupation productive.

REX *v.* OXFORD CANAL COMPANY, E. T. 1825. K. B. 4 *B. & C.* 74.

Where one canal company uses the canal of another, they are both liable to be rated.

BY the Oxford Canal Act the proprietors were authorized to take tolls according to the mileage, and by a subsequent act the Grand Junction Canal Company were enabled to use the Oxford canal; but the compensation was to be made to the proprietors of the Oxford canal, according to the tonnage.

The Court held, that both were rateable according to the same rules, and the tolls to be considered as earned in every parish along the whole line of the canal.

REX *v.* INHABITANTS OF KINGSWINFORD, T. T. 1827. K. B. 7 *B. & C.* 236; S. C. 1 *M. & Ry.* 20.

And where a canal runs through several parishes the rating should be according to the profits in each.

A CANAL passed through several parishes, in which the tonnage dues payable varied—

The Court held, that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal in proportion to the length of the canal in that parish.

REX *v.* INHABITANTS OF BARNBY DUN, H. T. 1835. K. B. 4 *N. & M.* 436.

A local act, creating an exemption except in A. or B., exempts new cuts authorized by a subsequent statute.

BY the 13 Geo. 1, it was enacted, "That a county should not be taxed for the navigation, or the profits thereof." By the 2 Geo. 4, which was for substituting other cuts and canals, it was, among other things, provided, "That all powers and authorities in former acts contained should extend and be applicable to the cuts and canals made under that act, as if the said cuts had been part of the navigation."

The Court held, that, by these words, the new cuts were made part of the old navigation; and that, as the old navigation was by the former act exempt from rate, they operated likewise to exempt the new cuts made under 2 Geo. 4.

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5. Cemetery.

REX *v.* INHABITANTS OF KENSINGTON, M. T. 1840. Q. B. 4 *P. & D.* 327.

A cemetery is rateable.

A COMPANY was enabled under an act of Parliament to purchase land for the purpose of establishing a cemetery, but had only power to sell and dispose of such of the lands purchased as should not have been used for the purposes of the act; they had also power to make and build so many catacombs and vaults for private burial places as they should think proper, and likewise to sell the exclusive right of burial in any of the vaults, catacombs, &c., either in perpetuity or for a limited period. By another section the company were to keep the cemetery and the several buildings, and the external walls and fences, and all other premises of the same, in thorough and complete repair. The case found that many of the catacombs and vaults were annually disposed of in perpetuity, in pursuance of the above power and according to a form given by the statute; and that the purchasers had had the keys of those catacombs and vaults delivered to them, after they had put doors to them as required by the act, and that they had done all requisite repairs, and that the company never exercised any acts of ownership in respect of such catacombs and vaults.

The Court held, that looking at the provisions of the act and the finding in the case together, the company were still liable to be rated in respect of those catacombs and vaults.

6. *Charitable Institution.*

REGINA *v.* STERRY, T. T. 1840. Q. B. 4 *P. & D.* 122.

A charitable institution, if producing a revenue, is rateable.

A HOUSE and premises, purchased from the funds of a charitable institution established by the Society of Friends, were vested in trustees and occupied for the purposes of a school. According to the rules of the institution every child admitted was bound to contribute 12*l.* annually, and no child was eligible whose parents were able to defray the expenses of its education elsewhere; but it appeared that in a great number of cases of inability this sum was contributed by the subscription of members of the society and private friends of the parents. This sum did not cover the whole expense of the board and education of the children, which averaged 20*l.* per annum.

The Court held, that the trustees of the institution were rateable for the premises, which produced in fact a revenue.

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7. *Clay-pit.*

REX *v.* BRETTELL, M. T. 1832. K. B. 3 *B. & Ad.* 424.

Clay-pits not rateable.

SHAFTS were sunk and steam-engines used for the purpose of raising clay for the purpose of making glass-house pots and fire-bricks.

The Court held, that the mode of obtaining the article, and not its geological character determined the rateability, and that such clay-pits were to be deemed mines and not rateable.

See Rex v. *Sedgley*, 2 *B. & Ad.* 65; *Rex* v. *Pomfret*, 5 *M. & Selw.* 139; *Rex* v. *Baptist Mill Company*, 1 *M. & Selw.* 612; *and Rex* v. *Bishop of Rochester*, 12 *East*, 353.

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8. *Common.*

REX *v.* CHURCHHILL, M. T. 1825. K. B. 4 *B. & C.* 750; S. C. 6 *D. & R.* 635.

Parties having a mere right of common are not rateable.

THE burgesses of Nottingham and the occupiers of ancient messuages there had as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude during that period the owner of the soil.

The Court held, that this was a mere right of common, and not rateable to the relief of the poor.

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9. *Corporations.*

REGINA *v.* MAYOR OF LIVERPOOL, H. T. 1839. Q. B. 1 *P. & D.* 334.

The rents of corporation

THE rents and profits of lands vested in the corporation by the 5 & 6 Will. 4, c. 76 (Municipal Corporations Act), were received by

lands applied to public purposes not rateable *.

the treasurer of the borough to the account of the borough fund, and, under sect. 92, applicable to public purposes.

The Court held them not rateable to the poor.

CORTIS *v.* KENT WATERWORKS COMPANY, T. T. 1827. K. B. 7 *B. & C.* 314.

A corporation rateable under the general law is not exempt by a local act.

A CORPORATION claimed an exemption from poor rates under a local act—

But the Court held, that a corporation which is rateable to the poor under the general law will not be exempted by a local act.

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10. *Courts of Justice.*

REGINA *v.* JUSTICES OF WORCESTERSHIRE, M. T. 1839. Q. B. 3 *P. & D.* 8.

A building for the use of justices of assize and quarter sessions not rateable.

A BUILDING was erected under a local act for the use of the judges at the assizes, and the justices at sessions.

The Court held, that, being vested in the justices for public purposes only, it was not liable to be rated by reason of its being used for keeping wine used by the justices for sessions, and as accommodation for sleeping by some of them.

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11. *Docks.* See, also, divs. *Canal—Tolls.*

REX *v.* INHABITANTS OF LIVERPOOL, T. T. 1827. K. B. 7 *B. & C.* 61.

Dues payable on a dock not profitable are not rateable.

CERTAIN justices were, by a local act (Liverpool Dock Act), bound to apply the dock dues in the discharge of certain burthens, and that, when discharged, the dues should be lowered, and were therefore not occupiers in the ordinary sense of the word, nor was any profit received for the use of any person.

The Court held, that they were not rateable in respect of such dues.

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12. *Easements.*

REX *v.* AIRE AND CALDER NAVIGATION COMPANY, T. T. 1829. K. B. 9 *B. & C.* 820.

An incorporeal hereditament,

THE undertakers of a navigation had no interest in the soil under the act originally creating it, but a power only to be exercised

* A corporation is not rateable to the relief of the poor in respect of lands of which the profits are payable to the borough fund under 5 & 6 Will. 4, c. 76, s. 92, although the land is situate in a parish without the limits of the borough. (*Reg.* v. *Inhabitants of Exminster*, T. T. 1840, Q. B., 4 P. & D. 69).

So, where, by ancient grants, which were set out in a case reserved by the sessions, it appeared distinctly that the appellants, who were a corporation, were entitled to a right of common only over a large tract of land, the Court held, that they were not rateable in respect thereof, although the case set forth a variety of facts from which, in the absence of the grants, it would have been presumed that the corporation had some exclusive right to the enjoyment and occupation of the surface. (*Reg.* v. *Chamberlain, &c., of Alnwick*, H. T. 1839, Q. B., 1 P. & D. 343).

in it for the purposes of making the river navigable; a subsequent act, reciting that the legal estate and interest in the navigation was vested in the trustees, authorized them to sell and convey in fee or by mortgage "the said navigation:"—Held, that it only recognised the interest originally created, which was no more than an easement in the bed of the river, and that they were not rateable as owners of the river.

as an easement, is not rateable,

See 9 *B. & C.* 94.

REX *v.* MERSEY AND IRWELL NAVIGATION COMPANY, H. T. 1829. K. B. 9 *B. & C.* 95.—S. P. REX *v.* THOMAS, H. T. 1829. K. B. 9 *B. & C.* 114.

A STATUTE enabled the undertakers to make and maintain the rivers M. and I. navigable, and for that purpose to cleanse, scour, enlarge, straighten, cut through banks, make new cuts, and to build bridges, sluices, &c., first giving satisfaction to the owners of the lands, and they accordingly purchased lands for such purposes, and for towing-paths:—Held, that they were not liable to be rated for the navigable bed of the river, having only an easement in it; but that, being owners of the soil where the cuts were made and locks placed, they were liable.

the party not being the owner of the soil.

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13. *Exchange, Building used as.*

REX *v.* LIVERPOOL EXCHANGE (PROPRIETORS OF), T. T. 1834. K. B. 3 *N. & M.* 550.

AN Exchange was, by a local act, vested in a company of proprietors, who were required to provide two public rooms for commercial purposes, to which, by regulation, certain fees were payable for admission, but were not payable by proprietors.

Rooms at an Exchange are rateable.

The Court held, that the Company were rateable for the fair annual value of such rooms, with its advantages, but of which the proprietors' privileges were not to be taken as part.

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14. *Gas Company.*

REX *v.* BRIGHTON GAS COMPANY, E. T. 1826. K. B. 5 *B. & C.* 466; S. C. 8 *D. & R.* 308.

A GAS Company were authorized, under an act, with consent of certain commissioners, to break up the road and pavement and lay down pipes, &c., and laid them accordingly for the conveying of gas from their works, situate in an adjoining parish.

A gas company is rateable in the respective parishes through which the pipes pass,

The Court held, that they were liable to be rated as occupiers of land in the parish where laid, and to the extent of the entire profits arising from the increased value of the land by the pipes so placed, which, whilst so fixed, were, with the land, to be considered as an entire thing, and the right to remove them did not make a difference.

See Rex v. *Corporation of Bath*, 14 *East*, 609; *Rex* v. *Rochdale Waterworks Company*, 1 *M. & Selw.* 634; *Rex* v. *St. Nicholas, Gloucester, Cald.* 262; *and Rex* v. *Hogg*, 1 *T. & R.* 721.

REX *v.* CAMBRIDGE GAS COMPANY, E. T. 1838. Q. B. 3 *N. & P.* 262.

but not in extra-parochial places.

THE pipes and mains of a gas company ran through several parishes:—Held, 1st, that the assessment must be in proportion to the quantity of the apparatus situate in each parish, and not according to the amount of profit received therein; and 2ndly, that pipes and mains running through the colleges and halls of the University of Cambridge, which are extra-parochial places, were not rateable in respect of such extra-parochial places.

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15. *Inclosure Act, Land held under.*

REX *v.* MAYOR &c. OF YORK, E. T. 1837. K. B. 1 *N. & P.* 530.

A corporation, having superintendence of an inclosure act, are the parties liable to be rated.

PRIOR to the passing of a local inclosure act, the freemen of a certain ward were entitled to right of stray and herbage over a moor, which rights were extinguished by the act, and allotments in lieu thereof made; and it appeared that the regulation of the exercise of the rights was in certain pasture masters and wardens, appointed by the mayor and aldermen, of whom the mayor was always one, the rest being aldermen, and who audited their accounts.

The Court held, that, although they received no benefit in their corporate capacity, except as any of them might be entitled as such freemen, the corporation were the parties rateable.

REX *v.* INHABITANTS OF WISTOW, T. T. 1836. K. B. 6 *N. & M.* 567; S. C. 5 *Ad. & E.* 250.

Rector liable to be rated, unless a clause of exemption.

UNDER an inclosure act, giving the rector a corn-rent in lieu of tithes, and directing that in the valuation they should be deemed to be equal in value to one-fifth of the annual net value of such lands—

The Court held, that he was liable to be rated, there being no clause of exemption.

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16. *Lighthouse.*

REX *v.* COKE, T. T. 1826. K. B. 5 *B. & C.* 797; S. C. 8 *D. & R.* 666.

The tolls of a lighthouse not rateable.

A RATE was imposed upon a lighthouse and the tolls payable in respect of ships passing by the same. The house was occupied by a servant of the owner, but the tolls collected out of the parish.

The Court held, that the lights not being of necessity attached to the freehold, and the profits arising therefrom not to be considered as accruing from the use and occupation of the land, although the lighthouse was rateable according to its value, the tolls and duties were not rateable.

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17. *Lunatic Asylum.*

REX *v.* ST. GILES, YORK, M. T. 1832. K. B. 3 *B. & Ad.* 573.

Charitable lunatic asylum is rateable.

THE trustees of a lunatic asylum, founded by charitable gifts for pauper lunatics, augmented their funds by the reception of affluent

patients paying according to their respective abilities; but the trustees derived no benefit therefrom, and allowed the profits to accumulate for the benefit of the charity—

The Court held, that as, in fact, the building produced profits, it was rateable; and the trustees in the actual receipt of those profits were the proper parties to be rated.

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18. *Mines.*

REX *v.* ATWOOD, H. T. 1827. K. B. 6 *B. & C.* 277.

ON an appeal against a rate—

Coal-mines rateable at the sum for which they would let*.

The Court held, that the owner and occupier of coal-mines is rateable to the poor at the sum for which the mine would let, subject to outgoings.

REGINA *v.* TODD, M. T. 1840. Q. B. 4 *P. & D.* 335.

A PARTY who was seised of wastes and mines, &c. as tenant for life, with power to lease, had demised the mines for twenty-one years, yielding one-fifth share of the ore raised, made merchantable, and fit for smelting, which had to undergo laborious and expensive processes for cleaning, &c., although the character of the ore remained unaltered.

The lessor may be rated;

The Court held, that the lessor was liable to be rated in respect thereof as an occupier of land.

REX *v.* TREMAYNE, M. T. 1832. K. B. 1 *N. & M.* 194; S. C. 4 *B. & Ad.* 142.

THE owner of the soil granted to miners the liberty of digging for manganese ores, rendering 1*l.* 15*s.* per ton raised during the term.

but a party having liberty to dig is not rateable;

The Court held, that he was not to be deemed an occupier of the soil, nor rateable as such, not being entitled to any part of the ore, but a mere money rent.

REX *v.* SEDGLEY, H. T. 1831. K. B. 2 *B. & Ad.* 65.

LIMESTONE was raised from pits of a great depth by sinking shafts, and working the stratum by roads, gates, heads, and the usual machinery of mining and obtaining ironstone.

and limestone from mines not rateable.

The Court held, that such excavations were properly deemed

* But where the owner and occupier of an ironstone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose:—Held, that the mine was not rateable to the poor in respect of the engine. (*Rex* v. *Bilston, Overseers of*, T. T. 1826, K. B., 5 B. & C. 851).

An act for inclosing a common, which directs that the allotments to the commoners shall be deemed to be within the township wherein the lands of such commoners lie, does not alter the right or liabilities of the owners of coal mines, either worked or unworked, under such allotment. (*Rex* v. *Pitt*, M. T. 1833, K. B., 2 N. & M. 363; S. C. 5 B. & Ad. 565).

mines; that, by the expression of coal mines in 43 Eliz., all other mines being excluded, the works in question were not liable to be rated.

REX *v.* DUNSFORD, H. T. 1835. K. B. 4 *N. & M.* 349.

The test is the mode of getting, and not the article.

UPON the question of rateability of mines or quarries—

The Court held, that the mode of getting and not the nature of the article, is the criterion to determine whether the excavation is a mine or not. Where the sessions confirmed the rate, designating the mine a quarry, but the case stated the facts, and put the question, whether the excavation was exempt, and not finding whether a mine or not, the Court directed the case to be sent back.

REX *v.* LORD GRANVILLE, H. T. 1829. K. B. 9 *B. & C.* 188.

The occupier of a mine is liable to be rated on improvements.

ON an appeal against a poor-rate—

The Court held, that the lessee and occupier of coal mines is rateable upon the improved value thereof, occasioned by steam-engines which he has erected, and which are used for draining the mines, and assisting the coals to the surface, and for railways laid down by him, and employed for facilitating the carriage of the coals.

REX *v.* INHABITANTS OF FOLESHILL, H. T. 1835. K. B. 4 *N. & M.* 360.

A coal mine is rateable in the several parishes into which it extends.

UPON an appeal against a poor-rate—

The Court held, that the owner of a coal mine is to be assessed to each parish in which the surface of the mine is, in proportion to the coal got in that part of the mine the surface of which lies within the parish, although there be but one shaft by which the mine is made available, and by which the whole of the coal is brought to the surface; and in that parish in which the shaft is he is rateable for the profits derived from the steam-engine and other machinery, and from the coal got from that part of the mine the surface of which is in that parish.

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19. *Missionary Society.*

REGINA *v.* WILSON, T. T. 1840. Q. B. 4 *P. & D.* 130.

A missionary society not rateable.

THE treasurer to the London Missionary Society was rated to the poor-rate for the parish of St. Botolph-without-Bishopsgate, in respect of premises held under lease by the society. The society was founded for religious and charitable purposes, and wholly supported by voluntary and charitable contributions. No person slept upon the premises. The treasurer attended about once a week, in his capacity of treasurer, for the purpose of superintending the society's affairs; he received no remuneration from the society, nor derived any pecuniary profit or emolument whatever from the occupation of the premises.

The Court held, that the rate did not attach.

20. *Paving and Lighting.*

REX *v.* BEVERLEY GAS WORKS, E. T. 1837. K. B. 1 *N. & P.* 646.

BY an act of Parliament, commissioners were empowered to pave, light, &c., the town of Beverley, and levy a certain rate on the inhabitants. By a subsequent act, they were authorized to contract for the supply of gas, or to erect or purchase gas works for lighting the town, and, in the latter event, to let out gas on such terms as they deemed fit, provided that the overplus, after payment of the expenses, should be applied to the purposes of the two acts. The commissioners did purchase certain gas works, and raised an overplus from the sale of gas, which they applied according to the purposes prescribed.

Commissioners of paving and lighting, holding premises for that purpose, not rateable.

The Court held, that they were not rateable to the poor rate in respect of such profit.

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21. *Quarries.*

REX *v.* TRENT AND MERSEY NAVIGATION COMPANY, E. T. 1825. K. B. 4 *B. & C.* 57.

CANAL proprietors had contracted with the owners of lime quarries for the supply of limestone at 7*d.* per ton, and that, if the latter failed to furnish it, the former might enter and take it at 2*d.* per ton, which they had accordingly done for several years, and it appeared that no other persons had ever worked the quarries.

A mere right for leave to take from a quarry does not render such party liable.

The Court held, that not having any sole and exclusive occupation, but a mere privilege, which the owners might have at any time given to others, the canal proprietors were not liable to be rated to the poor in respect of such quarries.

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22. *Reservoir.*

REX *v.* CHELSEA WATERWORKS COMPANY, T. T. 1833. K. B. 2 *N. & M.* 767; S. C. 5 *B. & Ad.* 156.

A WATER company, by warrant from the Crown, were empowered to use a reservoir, then on Crown land, and to excavate and lay their pipes therefrom, they agreeing to supply with water the adjoining palace at reasonable rates.

A reservoir is rateable.

The Court held, that the company were rateable as occupiers of the reservoir and land below the surface with their pipes, although the ranger might be rated for the occupation of the herbage only.

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23. *Serjeants' Inn*.*

* The occupiers of houses in Serjeants' Inn, Fleet-street, are not liable to poor's rates to the parish of St. Dunstan in the West. (*King* v. *Butterworth*, T. T. 1826, N. P., 2 C. & P. 391).

24. *Stock in Trade.*

REGINA *v.* LUMSDAINE, E. T. 1839. Q. B. 10 *Ad. & E.* 157, S. C. 2 *P. & D.* 219.—S. P. REGINA *v.* BRIDGEWATER, E. T. 1839. Q. B. 2 *P. & D.* 586.

The 6 & 7 Will. 4, c. 96, does not exempt stock in trade.

ON an appeal against a poor rate—

The Court held the 6 & 7 Will. 4, c. 96, did not operate as a repeal of the 43 Eliz., so as to exempt stock in trade from liability to be rated to the relief of the poor.

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25. *Tithes.*

REX *v.* GREAT HAMBLETON, T. T. 1833. K. B. 1 *Ad. & E.* 145.

Before 6 & 7 Will. 4, tithes were not rateable.

A LOCAL inclosure act provided that the tithes should be held in fee by a landowner, and that all his lands should be charged with an annual payment to the vicar, who had before enjoyed the vicarial tithes, and which he was to receive in lieu of all vicarial dues.

The Court held, that the tithes not being extinguished, the vicar was not rateable in respect of such annual payment.

REGINA *v.* CAPEL, T. T. 1840. Q. B. 4 *P. & D.* 87, *recognizing* REX *v.* JODDRELL, M. T. 1830, K. B. 1 *B. & Ad.* 403.

Under the 6 & 7 Will. 4, they are rateable.

THE vicar, who received 600*l.* a year as a composition for small tithes, out of which he paid 82*l.* 15*s.* for tenant's rates and ecclesiastical dues, was rated on 540*l.* as being the sum which the said tithes might reasonably be expected to let from year to year, free of all tenant's rates and taxes, and deducting from such rent the amount of the ecclesiastical dues.

The Court held, that the rate followed the directions of 6 & 7 Will. 4, c. 96, s. 1, which apply to tithes as well as lands, and that it could not be objected to on the ground that it was unequal, because the rent so estimated, on which the occupiers were rated, bore a smaller proportion to the profits of the land than the sum at which the vicar was rated bore to the yearly value of his tithes.

REX *v.* WILSON, T. T. 1835. K. B. 5 *N. & M.* 119.

The leaseholder of tithes is liable to be rated.

ONE parishioner, for the settling of all disputes, took a lease of the whole tithes, rendering a certain rent, which, by arrangement with the other tithe payers, he received from them.

The Court held, that he was liable to be rated as the occupier of the tithes, and that the occupation need not be beneficial.

REX *v.* JODDRELL, T. T. 1830. K. B. 1 *B. & Ad.* 403.

The corn-rent is to be added to the rack-

ON a settlement case, it appeared that a corn-rent was given in lieu of tithes.

The Court held, 1st, that in rating, tithe being an outgoing, the

corn-rent paid by the farmer was not to be added to the amount of the rack-rent upon which he was rateable, but for that the rector was to be assessed; 2ndly, that the farmer being rated for the rack-rent only, which was the landlord's profit, and not for the full value of the land, whilst the rector was rated for the full value of his corn-rent, the rate was unequal; 3rdly, that the rector was entitled to be allowed a deduction in respect of land-tax, if the other tenants paid it, without being allowed it from the landlords, but not if such allowance was made to them; and lastly, that the rector was entitled to deduct for ecclesiastical dues, which were a charge upon the rectory, but not for performing the duties, which were a personal charge.

rent; but the rate must be equal, and the rector is entitled to the deduction of land-tax.

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26. *Tolls.*

REX *v.* ST. MARY, LEICESTER, E. T. 1817. K. B. 6 *M. & Selw.* 400.

A LOCAL act exempted lands, used for a canal, from rates in respect of the value increased by the tolls—

Tolls per se are not rateable.

The Court held, that tolls per se were not rateable, but only in connexion with real property; the lands could only be rated with reference to the adjoining lands.

REX *v.* AIRE AND CALDER NAVIGATION, M. T. 1832. K. B. 3 *B. & Ad.* 533.

THE owners of certain mills in H. were under a canal act allowed to take certain tolls at a lock in the navigation in a different township—

Tolls at a mill not rateable;

The Court held, that they were not rateable in H. in respect of the tolls so taken.

REGINA *v.* THE BLACKFRIARS BRIDGE COMPANY, H. T. 1839. Q. B. 9 *Ad. & E.* 828; S. C. 1 *P. & D.* 603.

BY a local act, a company of proprietors were empowered to build a bridge for the use of the public, and, to enable them to do so, to raise money to be advanced by shares among themselves, and upon mortgage by strangers; they were to take tolls as soon as the bridge was open to the public, which were to be applied in paying the interest on the debt, and the surplus in paying the shareholders, to the extent of $7\frac{1}{2}$ per cent. on their shares. The excess over this dividend was to be applied in paying off the shareholders, and when they were paid off, the surplus over the interest of the mortgages was to be funded until there was a sufficient accumulation to pay off the mortgage debt, and to raise a small sum to meet the annual repairs; when this was done the tolls were to cease, and the company of proprietors were to become trustees to the public. The bridge was built, and opened to the public; all the money allowed by the act was raised, but a sum, greater than was authorized by the act, was required, and was borrowed. The tolls produced 1500*l.* per annum, and were applied in payment of the interest of the mortgage and in

but the tolls of a subscription bridge are rateable.

reduction of the second debt, but nothing was paid to the shareholders.

The Court held, that the company were rateable as beneficial occupiers of this bridge.

REGINA *v.* MARQUIS OF SALISBURY, E. T. 1838. Q. B. 3 *N. & P.* 476.

The owner of a bridge, if only demised by parol, is liable to be rated in respect of the tolls.

THE Marquis of Salisbury was rated as the occupier of land, described in the rate as Ware-bridge, which is a wooden structure across the river Lea, partly in the parish of Ware and partly in the parish of Great Amwell. It rested on wooden piles driven into the bed of the river, and on abutments of brickwork on the banks attached to the bridge; there was a stand used by the toll-collector, which was in the parish of Great Amwell. The woodwork and frame of the bridge had, during the last twenty years, been repaired at the expense of the Marquis, by whose orders the bed of the river had been excavated for the purpose of such repairs. He had repaired the planking of the carriage-way, but had never repaired the road itself. He was entitled to toll from persons carrying goods over the bridge, under a grant from the Duchy of Lancaster, in the reign of Charles I., of the town of Hertford and other possessions, together with the tolls, called traverse, to be taken as usually accustomed—that was, for every cart passing over Ware-bridge. In an inquisition, taken 17 Edw. 2, and in two ancient ministers' accounts the toll was described as toll traverse of the bridge of Ware. The tolls were at the time of the rate collected by a person for one Everett, who had contracted with the Marquis for the same, by a parol agreement for a certain sum, half of which was paid down at the time of the contract, and the rest, which was payable by monthly instalments, was secured by a warrant of attorney.

The Court held, first, that the sessions were justified in treating the Marquis as owner of the land on which the bridge stands, and, therefore, considering the tolls to be tolls traverse paid to him as owner of that land; secondly, that he was rightly assessed as the occupier, since Everett, not holding any demise of the land, nor any valid demise of the tolls, could only be looked upon as collecting them for him; thirdly, that as part of the land by which the tolls were earned was in the parish of Ware, the assessment in that parish was right.

REGINA *v.* CREASE, H. T. 1840. Q. B. 11 *Ad. & E.* 677; S. C. 3 *P. & D.* 434.

But the lessee of toll is not rateable, unless he be the occupier*.

THE appellant being the lessee for the residue of a term of ninety-nine years, created in 1815, of all the toll and farm of tin which should be gained, arise, or be due in the several places in the lease specified, by an indenture of demise, dated September, 1815, granted for the term of twenty-one years to J. R. and J. T. full and free liberty, license, and authority to enter upon all that land and ground comprehended within certain limits (being a portion of that of which

* A lessee of tolls in the nature of toll thorough held not rateable for the tolls to the poor, the lessee not being an inhabitant, although a toll-house in the parish was used for the convenience of collection. (*Rex* v. *Saunders*, E. T. 1833, K. B. 1 N. & M. 459).

the appellant was lessee), with full power and liberty to break and open the soil and ground, and to drive any adits or levels, and to sink any shafts, and to make any erections or buildings for digging and searching for tin and tin-ore, according to the custom of tin-works; and also with liberty at their free will and pleasure to take and carry away the same, reserving nevertheless unto the appellant the liberty, from time to time, to enter and inspect the workings of the mine, and to take up any adits for the purpose of working any adjoining mine, and to keep open, repair, and use the same, making reasonable compensation to J. T. and J. R. for so doing; yielding, paying, and deducting during the term, to the appellant, from time to time, within six weeks after the return or sale of every parcel of tin or tin-ore, the clear sum of one shilling in the pound on the gross value, according to the price of the day, &c., to be paid clear and free from all returning charges, poor rates (if any should be payable), and all other rates and deductions whatsoever.

The Court held, that the appellant was not liable to be rated in respect of this toll of tin, as he was not an occupier, but received a money payment in the nature of a rent.

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27. *Towing Path.*

BRUCE *v.* WILLIS, H. T. 1840. Q. B. 3 *P. & D.* 220.

A navigation company, who hire a towing path, are rateable in respect thereof.

BY an act of Parliament, certain persons were authorized to make the river Avon navigable from B. to H., and for that purpose, amongst other things, to make new cuts and locks, first giving satisfaction to the owners of the lands taken; and commissioners were appointed to settle what satisfaction every owner or occupier of such lands should have, and what proportion of such purchase-money and satisfaction every person having a particular interest in the premises should have in respect of his interest; and were empowered to summon juries, to assess damages, and recompense such owners and occupiers for their respective estates and interests; and the undertakers were authorized to take certain tolls. By a second act, reciting, amongst other things, that the company had purchased lands under the former act, the proprietors of the navigation were authorized to make a horse-towing path, and for that purpose to purchase any lands necessary for the same, and to treat with the owners for damages done thereto; and commissioners were appointed with the same powers as in the former act. It appeared that inquisitions had been taken under both these acts, and that juries had assessed, by way of damages, sums amounting to thirty years' purchase of the land in some cases, and annual payments in others, for the damage to be done by making a new cut and locks, and for the towing path.

The Court held, that the proprietors of the navigation were liable to be rated as occupiers, both for the new cut and locks, and also for the towing path.

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28. *Turnpike Road*.*

* Trustees of a road made under a local act, although beneficially interested in the tolls, held exempt from rate in respect thereof, under 3 Geo. 4, c. 126, s. 51). (*Rex* v. *Dover-street Trustees*, H. T. 1836, K. B., 1 N. & P. 157).

29. *Underwood.*

REGINA *v.* NARBERTH, H. T. 1839. Q. B. 9 *A. & E.* 815; S. C. 1 *P. & D.* 590.

Whether underwoods are or not rateable, depends upon the mode of growing and cutting.

SHOOTS growing from the roots of oaks cut down, and which were regularly weeded, and, after fifty years' growth, cut regularly for firewood, the sessions had decided not to be saleable as underwood, and the Court refused to disturb the decision: whether such are to be deemed within the stat. 43 Eliz. c. 2, must depend on the mode of treatment by the owner and the limits of the period in cuttings, and which are facts entirely for the decision of the sessions.

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30. *Unions and Workhouses.*

REGINA *v.* WALLINGFORD UNION, T.T. 1839. Q.B. 2 *P. & D.* 226.

Union workhouses are rateable.

THE guardians of a union, formed under the Poor Law Amendment Act, erected a union workhouse—

The Court held them rateable to the relief of the poor of one of the parishes of the union in respect of the workhouse situate in that parish.

BRISTOL, (GOVERNORS, &c.) *v.* WAIT, E. T. 1836. K. B. 6 *N. & M.* 383; S. C. 5 *Ad. & E.* 1.

And poorhouses out of the parish rateable.

THE overseers of parish A. took certain houses and buildings situate in parish B. for the purposes of the poor of parish A., and the buildings were exclusively occupied by the poor of that parish, who were employed in a manufactory which brought no actual profits to the parish of A.

The Court held, 1st, that the purpose for which the premises were used did not exempt the overseers of A. from being rateable in respect of the occupation of the premises situate in parish B.; and, 2ndly, that, as the premises were such as to be capable of a beneficial occupation, the fact of the occupation not being profitable to the parish was immaterial.

(*c*) OF THE ABANDONMENT OF THE RATE.

REX *v.* JUSTICES OF CAMBRIDGE, M. T. 1834. K. B. 4 *N. & M.* 238; S. C. 2 *Ad. & E.* 370.

The parish officers cannot abandon the rate.

AFTER allowance and publication, and notice of appeal given, the parish officers gave notice of intention to abandon the rate, but refused to pay the costs of the appellant then incurred.

The Court held, that the appeal having been entered in pursuance of notice, the sessions had jurisdiction, and were bound to quash the rate if the reasons assigned by the appellant were sufficient; and the Court would compel them by mandamus.

(*d*) Of reducing the rate.

Rex *v.* Justices of Yorkshire, M. T. 1832. K. B. 1 *N. & M.* 108; S. C. 4 *B. & Ad.* 342.

An application to reduce must be made at the same sessions.

Under the 41 Geo. 3, c. 23, s. 8, the application to order the repayment of rates reduced by the court of quarter sessions—

The Court held could only be made to the same sessions at which the rate is amended and recorded, after which the jurisdiction expires; and they therefore refused a mandamus.

(*e*) Of quashing the rate.

Rex *v.* Inhabitants of Bromyard, E. T. 1828. K. B. 8 *B. & C.* 240; S. C. 2 *M. & Ry.* 280.

The rate must shew in respect of what property it is made.

On motion to quash an order of sessions—

The Court held, that it ought to appear on the face of the rate, in respect of what property the assessment is made on each individual charged in the rate, and the omission would be a sufficient ground for quashing the rate; but, where the notice of appeal did not state such as one of the grounds of appeal, that the court of quarter sessions had no jurisdiction to quash the rate for the defect, though apparent on the face of it.

(*f*) Of the manner of compelling payment of.

1. *By Action.* See also, post, tit. *Replevin.*

Priestly *v.* Watson, M. T. 1834. Ex. 4 *Tyrw.* 916.

No action will lie for distraining for a poor rate, unless notice of appeal had been given*.

An appeal was entered against an increased assessment, but before notice given to the overseers they distrained, and the rate was paid under a protest; the rate was afterwards reduced by the sessions, upon a recommendation of the Court of King's Bench. Upon the case being sent back, an action being brought against the overseers, who levied the distress, to recover the surplus—

The Court held, that no notice of the appeal having been given, as required by 41 Geo. 3, c. 23, s. 2, the action was not maintainable.

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2. *By Distress.*

Sibbald *v.* Roderick, M. T. 1839. Q. B. 11 *Ad. & E.* 38; S. C. 3 *P. & D.* 106.

If void as to part void altogether.

In replevin, it appeared that the plaintiff was occupier of tithes in the parish, and the defendants distrained his cattle under a war-

* Where the plaintiff in replevin on a distress for poor rates failed to proceed with his writ:—Held, that, under the 43 Eliz. c. 2, s. 19, the broker's charges were the only damages incurred in respect of which the defendant was entitled to treble damages. (*Newman* v. *Barnard*, H. T. 1834, C. P., 10 Bing. 274; S. C. 3 M. & Scott, 748).

rant, stating that the plaintiff was duly rated and assessed in and by certain rates and assessments made, assessed, allowed, and published according to the statute, in the sum of 40*l.* 6*s.* 8*d.* Demand and refusal to pay. Several rates were put and their allowance proved; but it appeared that some of them had not been published on the Sunday next after the allowance. The jury found for the plaintiff. It was contended for the plaintiff that the warrant was bad altogether, some of the rates being defective. (*Hurrell* v. *Wink*, 8 Taunt. Rep. 359).

The Court took time to consider, and entertaining the same opinion refused the rule, on the ground that there had been no publication in pursuance of the act, and therefore the rates were nullities.

CORTIS *v.* KENT WATERWORKS COMPANY, T. T. 1827. K. B. 7 *B. & C.* 314.

Where a demand is to be made, service on the chairman of a company is sufficient.

BY a local statute, a personal demand for the payment of a poor-rate was required to be made upon the parties to whom it applied, or a demand in writing to be left at their last usual place of abode, or upon the premises charged.

The Court thought that a written demand, served by the collector upon the chairman of a company at a general meeting of the proprietors, was sufficient.

CORTIS *v.* KENT WATERWORKS COMPANY, T. T. 1827. K. B. 7 *B. & C.* 314.

If the overseers have not the power to make the rate, they cannot distrain.

JUSTICES at sessions were empowered to assess a special rate upon the parishes and townships within the county, "the overseer and overseers of each parish, &c. being authorized to levy such rate in like manner and by such ways and means as any poor-rate is now by law collected."

The Court held, that commissioners invested by a parochial act with the sole power of making and collecting rates, although the office of overseer was still continued, were the proper persons to raise such special rate within the parish for which they acted.

COTTON *v.* KADWELL, M. T. 1833. K. B. 2 *N. & M.* 399.

Under distress the constable must, when tendered, take the amount of the rate.

AT the time of executing a warrant of distress for a poor-rate, the party tendered the amount of the rate but refused to pay the costs, and the defendant, the constable, afterwards levied for the rate.

The Court held the distress illegal; and that no previous demand and refusal of a copy of the warrant was necessary, there being no remedy even against the magistrates.

KAY *v.* GRAVES, H. T. 1831. C. P. 7 *Bing.* 312; S. C. 5 *M. & P.* 140.

If the officer takes privileged goods he is not within 24 Geo. 2, c. 44.

THE defendant (a constable) seized under a warrant of distress for poor rates goods that were already in the custody of the landlord of the premises under a distress for rent.

The Court held, that he was not within the protection of the 6th section of the 24 Geo. 2, c. 44, and consequently, that a demand of a copy of the warrant was not necessary to enable the landlord to maintain trespass.

3. *By Mandamus.*

REX *v.* JUSTICES OF SUSSEX, H. T. 1834. K. B. 3 *N. & M.* 263.

ON motion for a mandamus—

Per Denman, C. J.—The Court has always been unwilling to compel magistrates by mandamus to issue their warrant to levy a poor-rate; if, however, it be perfectly clear that the rate is due and legal, this Court cannot with propriety refuse to interfere.

If legal will be enforced by mandamus.

REX *v.* JUSTICES OF BUCKS, T. T. 1834. K. B. 3 *N. & M.* 68.

ON motion for a mandamus, it being doubtful whether the landlord taking possession of a grass farm by his servant, upon the tenant quitting, had such a beneficial occupation as to be liable to be rated—

The Court refused a mandamus to the justices to issue their warrant to levy the rate, which might subject them to the risk of an action if the rate should turn out to be bad.

But no mandamus, if doubtful as to liability to rate.

REX *v.* JUSTICES OF BUCKS, E. T. 1837. K. B. 1 *N. & P.* 503.

A LOCAL act for rebuilding a church empowered the trustees to make a rate on the houses, &c. and hereditaments "rated or rateable to the poor."

The Court held, that tithes were rateable, and being clearly so, a mandamus lay to justices to compel the issuing a distress warrant against a tithe occupier refusing to pay the rate.

A mandamus lies to compel a distress.

(*g*) OF THE COLLECTOR*.

VIII. RELATIVE TO THE RELIEVING AND ORDERING OF.

BASTOCK *v.* RIDGWAY, E. T. 1827. K. B. 6 *B. & C.* 496.

ON a question of settlement, nothing appeared to shew that hamlets, which had separated by mutual agreement so recently as 1753, could not have the full benefit of the statute of Elizabeth.

The Court would not presume that they had been legally separated for the purpose of maintaining their own poor.

There is no presumption that hamlets should separately support their own poor.

REX *v.* COLCESTON, T. T. 1830. K. B. 1 *B. & Ad.* 25.

ON a settlement case—

The Court held, that if there be evidence on one side, and the sessions act upon what is not evidence on the other, the Court will

The sessions must act upon what is evidence.

* An extra collector of poor-rates, paid by a per-centage on his collection, held to be a servant or clerk within the 39 Geo. 3, c. 85; and where the averment was, that he received 11*s.* on account of his employers, &c., held not to be supported by evidence of his having received a one pound note, and given 9*s.* in change, the statute in that instance not applying. (*Rex* v. *Ward*, 1818, N. P., 1 Gow, 169).

adjudicate where the sessions acted upon continued relief generally, as establishing a settlement. The Court quashed the order; and held, that relief, by binding out a child apprentice, does not carry the effect of relief farther.

REX *v.* INHABITANTS OF YARWELL, T. T. 1829. K. B. 9 *B. & C.* 894.

Frequent relief is not evidence of a settlement.

THE respondents relied only on evidence of frequent relief given by the appellant parish to the pauper, whilst residing in the respondent parish. The sessions, nevertheless, quashed the order.

The Court, holding that the sessions not being bound to act merely on such primâ facie evidence of settlement, refused to disturb the decision.

REX *v.* INHABITANTS OF MAULDEN, E. T. 1828. K. B. 8 *B. & C.* 78; S. C. 2 *M. & Ry.* 146.

An order for relief may be good as to part and bad as to part.

AN order of relief in respect of a lunatic pauper, under 5 Geo. 4, c. 71, reciting that the justices "having adjudged" the legal place of settlement, &c., and directing the payment of certain sums from a previous day to the date of making the order; the appellant treating the order by their notice of appeal as an order of settlement, and the Court, therefore, assuming no other order to have been made:—Held, 1st, that they would understand the words "having adjudged" as being used in the sense "do adjudge;" and 2ndly, that, although part of the order was bad as to the retrospective payments, the justices having no power to make such, yet that the order was good as to the residue.

REX *v.* CORNISH, E. T. 1831. K. B. 2 *B. & Ad.* 498.

An order may be made on the grandfather*.

ON motion to quash an order for relief—

The Court held, 1st, that under the 43 Eliz. c. 2, justices have a discretion whether they will make an order upon the grandfather rather than on the father of a poor impotent person; but 2ndly, whether they have such a discretion or not, an order which is made upon the grandfather need not state, upon the face of it, that the father is dead, or unable to support the pauper.

TOMLINSON *v.* BENTALL, T. T. 1826. K. B. 5 *B. & C.* 738; S. C. 8 *D. & R.* 493.

The parish in which an accident happens is liable, though the officers refuse an asylum to the pauper, who is taken to another parish.

A PAUPER met with an accident in the parish of H., adjoining that of her settlement, which entirely incapacitated her from going home; and after being carried about, and refused an asylum by the officers of H., the parish where it happened, was forced to be taken home to M.:—Held, that having been entitled to attendance and surgical relief in H., but having received it in M. by the wrongful conduct of the parish officers in H., it was the same as if the officers of H. had stood by and directed the attendance of the surgeon in H., and were liable to pay his bill.

* Where there is no legal obligation to take care of and maintain another, as in the case of brothers, held, that no indictment could be maintained for mere non-feasance, as negligence in providing proper custody and maintenance of an idiot brother. (*Rex* v. *Smith*, 1826, N. P., 2 C. & P. 449).

REX *v.* OLDLAND, E. T. 1836. K. B. 6 *N. & M.* 529; S. C. 4 *Ad. & E.* 929.

A PAUPER residing in a parish, in the course of his employment there met with an accident, and in consequence received relief from the parish in which he was so resident.

A pauper, who comes animo morandi, and meets with an accident, is not casual poor.

The Court held, that he could not be considered as casual poor, but that he was a person coming to settle within the statute of Car. 2, and removable in the eye of the law:—Held, also, that the consequences of the accident were an infirmity within the stat. 35 Geo. 3, c. 101, so as to give a power to the justices to make an order of suspension, and to direct the expenses of the pauper's maintenance during the suspension to be paid by the parish to which the pauper was removable.

REX *v.* POOR LAW COMMISSIONERS, T. T. 1836. K. B. 1 *N. & P.* 371.

UNDER 4 & 5 Will. 4, c. 76, ss. 38, 39—

Under 4 & 5 Will. 4, poor law commissioners cannot interfere, where managed by a local act.

The Court held, that the poor law commissioners have not jurisdiction to make an order for the election of a board of guardians in single parishes, where the administration of the poor law is already vested by a local act in a board of directors.

REX *v.* JUSTICES OF NORTH RIDING OF YORKSHIRE, H. T. 1837. K. B. 2 *N. & P.* 103.

THE notice, under 4 & 5 Will. 4, c. 76, s. 73, of an application for an order of maintenance of a bastard child, signed by overseers of a township, but not by its own church officers (chapelwardens)—

Under 4 & 5 Will. 4, as to bastards, the notice of an order of maintenance, signed by the overseers, sufficient.

The Court held sufficient; and query, if necessary for all the overseers to sign it?

CHAPPELL *v.* POLES, T. T. 1837. Ex. 2 *M. & W.* 867.

THE putative father of a bastard child paid a sum to the defendants, being then parish officers, in exoneration of all claim, and the child dying before the year expired, they paid over the balance not expended to their successors.

The overseers cannot take a gross sum for maintenance of a bastard.

The Court held, that the money paid, being on a transaction originally illegal and void, was from the first money in the hands of the defendants had and received to the use of the plaintiff, and he was entitled to recover it back from them.

IX. RELATIVE TO THE TREATMENT OF THE POOR*.

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* If parish officers cut off the hair of a pauper in the poor-house by force, and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. (*Forde* v. *Skinner*, 1830, N. P., 4 C. & P. 239).

Port Duty.

HULL DOCK COMPANY *v.* PRIESTLY, M. T. 1832. K. B. 1 *N. & M.* 85; S. C. 4 *B. & Ad.* 178.

Vessels proceeding to Hull are liable to duty.

UPON the construction of the 14 Geo. 3, c. 56, (Hull Dock Company Act)—

The Court held, that vessels taking in the whole or part of their cargo at Goole, and proceeding to Hull, are liable to the tonnage duty of 2*d.*; but, that vessels proceeding from Leeds, above Goole, and passing only through the basin, the entrance into the port of Goole, are not liable to any duty.

HULL DOCK COMPANY *v.* BROWNE, H. T. 1831. K. B. 2 *B. & Ad.* 43.

But the Hull Dock Act does not apply to vessels going to places without the dock.

UPON the construction of 14 Geo. 3, c. 56, (Hull Dock Company Act)—

The Court held, that the "port of Kingston-upon-Hull" is not to be taken as extending to subject to dock duties vessels going into the Humber to places which, as to local description, are without the port of Hull, according to the popular sense of the term, as Goole in the river Ouse, falling into the Humber.

CARTER *v.* HOLMES, E. T. 1831. K. B. 2 *B. & Ad.* 592.

Precious metals not within the word "metals," as to dues.

AN act of Parliament authorized duties according to a schedule. The schedule, under the head "metals," specified cast-metal, copper, brass, pewter, and tin, authorizing a certain duty upon each, and then a certain duty upon "all other metals not enumerated."

The Court held, that the latter words meant all other metals ejusdem generis, and that they did not include gold and silver.

Possession. See tits. *Trespass—Trover.*

Possessory Action. See tits. *Nuisance—Trespass—Trover.*

Postea*.

See also ante, tit. *Amendment.*

PADDON *v.* BARTLETT, M. T. 1834. K. B. 4 *N. & M.* 321.

If there be three issues, and

IN debt for £—, (20 years' rent, by deed), the defendant pleaded, 1st, non est factum; 2ndly, that no cause of action accrued within six

* See Form, Reg. Gen. 4 Will. 4. By Rule E. T. 2 Will. 4, C. P., it is ordered, that after the posteas have been left with the clerk of the judgments, conformably with the Rule made in T. T. 13 Geo. 2, it shall be lawful for the

years; and, 3rdly, as to £—, part of the rent for ——, ending on 2nd February, 1833, that the defendant, on the 30th June, 1815, assigned all his estate and interest to certain persons, and no part of the last-mentioned sum became due from defendant to the plaintiff. The plaintiff obtained a verdict on the 1st and 2nd issues, and the defendant on the third.

the defendant establishes one, he is entitled to the postea.

The Court held, that the defendant was entitled to the postea, having established a defence.

JOHNSON *v.* HAMILTON, H. T. 1836. Ex. 4 *D. P. C.* 762; S. C. 1 *M. & W.* 149; S. C. 1 *T. & G.* 45.

UPON an application to retain the postea, the affidavits stated facts raising only a strong probability that the plaintiff was dead before the trial—

On motion the Court will not retain the postea.

The Court refused to interfere, leaving the defendant to avail himself of the objection by writ of error.

RICHARDSON *v.* MELLISH, M. T. 1825. C. P. 3 *Bing.* 334; S. C. 346.

UPON a general verdict to a declaration, of which several counts were bad—

The postea may be amended by the Judge's notes, even after judgment in error.

The Court permitted the postea to be amended by reference to the Judge's notes, by entering the verdict on the first count only, after argument in error in K. B.; and said, that a transcript only of the record being in fact removed into the K. B., it could amend the judgment roll by the postea, after judgment in error in K. B.; and the record being defective, the course would be for the defendant in error to allege diminution, and the court of error would cause the actual record to be brought before them by writ of certiorari; or the Court below would certify to the Court of error the amendment which had been made.

Post-Horse Duty*.

HAMMOND *v.* HOOLEY, T. T. 1834. C. P. 1 *Bing. N. S.* 131.

BY the 4 Geo. 4, c. 62, an option is given to the party charged with the duty either to pay one-fifth of the whole sum earned, or 1*s.* 9*d.* for each horse let. In this case it was clear, from the form of the return, that he did not intend to be charged with the 1*s.* 9*d.*,

The falseness of a return as to the post-horse duty must be shewn by the

clerks of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution. And it is thereby ordered that the attorney, or agent, who procures such posteas from the office of the clerk of the judgments, shall cause the same to be returned again to the same office during the office hours of that day.

* Where the collector of the post-horse duties, alleging that horses had been let out by the prosecutor without paying the duty, demanded a sum of money under threat of Exchequer process, and the party gave him a note for 5*l.*, which was afterwards paid, and the defendant handed it over to his principal:—Held, to amount to the offence of extortion. (*Rex* v. *Higgins*, 1830, N. P., 4 C. & P. 247).

party seeking to impeach it.

and there appeared every reason to suppose that the one-fifth was truly stated, although the amount earned was omitted.

The Court held, that the onus of falsifying the return lay on the party seeking to recover the penalties, because he had the power of compelling the return to be verified by oath.

Post Obit Bonds*.

Post-Office†.

MEIRELLES *v.* BANNING, T. T. 1831. K. B. 2 *B. & Ad.* 909.

Assignees may demand the bankrupt's letters from a postmaster.

IN debt for penalties under 9 Anne, c. 10, s. 40, against a postmaster for having wittingly, willingly, and knowingly detained letters, it appeared that the party to whom they were addressed having become bankrupt, the assignees had demanded, and the postmaster, according to the practice of the office, and believing them to be entitled to receive them, had delivered them up—

The Court held, that the words willingly &c. must be taken to denote acts done with a conscious mind that the party was doing wrong, and that the act did not apply where the letters were delivered to a person claiming under a colour of title.

ABBEY *v.* LILL, H. T. 1829. C. P. 5 *Bing.* 299.

It seems a person not connected with the Post-office may prove the post-mark‡.

A DATE of a letter varying from the post-mark, it was objected that the post-mark could only be proved to be genuine by calling the person from the Post-office who impressed the letter; on which the Judge offered to stay the cause till the arrival of such clerk; but the jury found that the post-mark was genuine without his being called.

The Court refused to disturb the verdict, intimating an opinion that any other person might prove it.

* See *Murray* v. *Earl of Stair*, T. T. 1823, K. B., 2 B. & C. 82; S. C. 3 D. & R. 278; *Wordell* v. *Fermor*, 2 Campb. 282; *Lushington* v. *Waller*, 1 H. Bl. 94).

† If a postmaster has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time if he sent a special messenger, though too late to do so by post. (*Hordern* v. *Dalton*, 1824, N. P., 1 C. & P. 181). S. was employed by a postmistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the postmistress, but which was repaid to her by the Post-office :— Held, that S. was a person employed by the Post-office, within the statute 52 Geo. 3, c. 143, s. 2. (*Rex* v. *Salisbury*, 1831, N. P., 5 C. & P. 155).

‡ The post-mark upon a letter is primâ facie evidence as to the existence of the letter at the time of the date, where such mark is proved to have been the one used by the office at that time. (*Fletcher* v. *Braddyll*, 1820, N. P., 3 Stark. 64). Where, in trespass for taking goods, the question was as to the bankruptcy of the plaintiff :—Held, that letters found in his possession after the bankruptcy, with postmarks of a date previous thereto, must be taken to shew that he received them before. (*Cotton* v. *Jones*, M. T. 1829, N. P., 3 C. & P. 505; S. C. 1 M. & M. 276. See *Abbey* v. *Lill*, H. T. 1829, C. P., 5 Bing. 299.

Poundage. See tits. *Fi. Fa.—Sheriff.*

Power of Attorney.

See tits. *Bank of England—Forgery.*

GAUSSEN *v.* MORTON, E. T. 1830. K. B. 10 *B. & C.* 731.

An authority, coupled with an interest, cannot be revoked.

A POWER of attorney authorizing a surrender of copyhold premises for the purposes of sale, in order that the person authorized might satisfy a debt—

The Court held, this was a power coupled with an interest, and therefore could not be revoked.

ATTWOOD *v.* MUNNINGS, M. T. 1827. K. B. 1 *M. & Ry.* 66.

The defendant, a partner, giving a power to his agent to draw and accept bills "for me and on my behalf" does not authorize the name of the firm being used.

THE defendant, partner in a firm, had executed a power of attorney, not containing an express power to accept bills, and afterwards a second power, in terms, "for *me* and on *my* behalf, to pay and accept such bills as shall be drawn or charged on me by *my* agents or correspondents, as occasion shall require"—

The Court held, that the power was to be confined to bills drawn on the defendant on his private account and in respect of his own individual transactions, and not on account of the partnership. A power to pay or receive money, buy and sell lands, bring and defend actions, give and take releases, indorse and negotiate bills payable to the principal, would not authorize the attorney to accept bills drawn on the principal.

Powers.

I. RELATIVE TO THE CONSTRUCTION OF, p. 214.

II. RELATIVE TO THE EXECUTION OF, p. 214.

III. RELATIVE TO LEASING POWERS, p. 217.

IV. RELATIVE TO THE RIGHTS OF APPOINTOR, p. 219.

V. RELATIVE TO THE DESTRUCTION OF, p. 220.

VI. RELATIVE TO BANKRUPTS AND INSOLVENTS, p. 220.

VII. RELATIVE TO TRUSTEES, p. 221.

I. RELATIVE TO THE CONSTRUCTION OF.

DOE *d.* NOWELL *v.* ROAKE, H. T. 1825. C. P. 2 *Bing.* 497.

In construing a power the appointor's intention must be considered*.

TESTATRIX being seised of one moiety of land, and of a power of appointment of the other, and of no other real estate, devised all her freehold estate in S. to her nephew for his life (on condition that out of the rents he should keep such estate in proper and tenantable repair), and, on his decease, to and amongst his children equally at twenty-one, and their heirs as tenants in common, with remainders over in default of such children.

The Court held, that, every other part of the will demonstrating a clear intention of the testatrix to keep the estate united, and nothing to rebut the inference of an intention to execute the power being reserved, such devise was a valid execution of it, and that both moieties passed to the nephew.

DOE *d.* COURTAIL *v.* THOMAS, H. T. 1829. K. B. 9 *B. & C.* 288; S. C. 4 *M. & Ry.* 218.

One part of a power may control another until the latter be called into action.

LANDS were devised to trustees to convey to B. for life, with a leasing power for twenty-one years, and a power also to charge them with an annuity for B.'s husband and to raise portions, under which latter power B. created a term for 500 years, upon trust (if she should so direct) to raise certain portions, the term to commence in computation immediately, but for certain purposes not to take effect immediately.

The Court held, that the leasing power was to be considered as controlling and superseding the term until that was called into action by the trustee.

II. RELATIVE TO THE EXECUTION OF.

CHOLMELEY *v.* PAXTON, M. T. 1825. C. P. 3 *Bing.* 207.

If injurious to the reversioner it is not well executed†;

LANDS were devised to trustees in trust for A. for life, without impeachment of waste, with divers remainders over, with power to the trustees, on the request of any tenant for life, to sell, and for the

* Where lands are appointed under a power to A. to the use of B. the legal estate is in A. (*Doe* d. *Worger* v. *Haddon*, H. T. 1829, K. B., 4 M. & Ry. 118). By deed between co-parceners and their husbands, to lead the uses of a fine, in order to effect a partition, the share of one co-parcener was limited (after life estates to the parents) "to the use of the child or children (without words of inheritance) for ever, subject, nevertheless, to such divisions, directions, orders, and appointments, as the husband by will or deed should think fit to direct or appoint:—Held, that these words gave the husband not merely a power of distribution, but a general power to appoint the fee simple, and that such power was well executed by indentures of lease and release, expressed to be made in consideration of money paid as well as of natural affection. (*Doe* d. *Chadwick* v. *Jackson*, 1836, N. P., 1 M. & Rob. 553).

† On a devise to such of the testatrix's children as J. S. should by deed or will appoint, and an appointment executed in consequence of a previous contract with one of the objects of the power to pay annuities to the other objects, and also to provide for certain costs, and to settle the estates upon the appointee for life, with remainders to his children:—Held to be well executed. (*Tucker* v. *Sanger*, T. T. 1825, Ex., 1 M'Clel. & Y. 425).

An estate, comprising a manor and tenements, with the appurtenants, was

purpose of such sale to revoke the uses of the will and declare other uses, but to lay out the proceeds in other lands, which they were to hold to the same uses as the lands devised. The trustees sold the land exclusive of the timber, and applied the proceeds as directed, and by the same conveyance the tenant for life sold and conveyed all the timber, and received the purchase-money.

The Court held, that the power of sale was not well executed, as being injurious to the reversioner, and therefore void.

DOE *d.* MATTHEWS *v.* MATTHEWS, T. T. 1833. K. B. 2 *N. & M.* 264; S. C. 5 *B. & Ad.* 298.

UNDER a power to demise the lands at the like rents as were then reserved or more—

and when to demise lands, should not include other property.

The Court held, that a demise thereof with other lands at an entire rent was void as to the whole premises.

DOE *d.* SPILSBURY *v.* BURDETT, H. T. 1836. K. B. 6 *N. & M.* 259; S. C. 4 *Ad. & E.* 1.

AN estate was conveyed to trustees under a marriage settlement to hold in trust, from and immediately after the decease of L. H. W., to the use and behoof of such person or persons, for such estate or estates as the said L. H. W., whether covert or sole, and notwithstanding her present intended or any future coverture, by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or by any codicil, &c. "to be by her signed, sealed, and published in the presence of and attested by three credible witnesses," should devise. L. H. W. made her will, concluding in these words:—"I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal." (Signed L. H. W., and seal affixed. Witness, C. B., E. B., A. B.).

But substantially signing, sealing, and publishing as directed by the power is sufficient.

The Court held this to be a good attestation, and the instrument a good execution of the power.

demised to trustees to the use of the eldest son of Sir H. E. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of his eldest son in tail male, &c., with a power to the trustees, at the request of the person who for the time being should be in possession or entitled to the rents and profits of the said manor and tenements, with the appurtenants, by virtue of the limitations therein contained, by any deed or writing to make sale or dispose of the same, or of any part or parts of the manor and tenements aforesaid, with the appurtenants, to any person, either together or in parcels; and to that end the trustees were also empowered by any deed or deeds, writing or writings, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, created, provided, and declared of and concerning the manor and tenements aforesaid, with the appurtenants, sold, to be sold, disposed of, or exchanged, and by the same or any other deed or deeds, writing or writings, to limit and appoint the manor and tenements aforesaid, with the appurtenants, whereof the uses should be so revoked, unto the purchaser. The trustees sold the estate, exclusive of the timber growing upon it, for £13,400, and the tenant for life by the same deed sold the timber, wood, and underwood for £2448:—Held, that the power was not well executed. (*Cockerell* v. *Cholmeley*, H. T. 1830, K. B., 10 B. & C. 564).

CURTEIS *v.* KENRICK, E. T. 1838. Ex. 3 *M. & W.* 461.

And the words "sealed and delivered" are equivalent to "published."

A POWER was given to a married woman by her marriage settlement to appoint certain lands to uses by her last will and testament, "signed and published in the presence of and attested by three witnesses." By her will she devised all her property, real and personal, without any reference to the power. The attestation stated the will to be signed, sealed, and delivered by the testatrix, in the presence of three subscribing witnesses.

The Court held, that delivery is equivalent to publication of a will, and that this will was a due execution of the power.

WALKER *v.* LAXTON, T. T. 1827. Ex. 1 *Y. & J.* 557.

A power executed under a mistake may be binding.

THE testatrix having, under a marriage settlement, in default of issue, a power of appointment over a certain sum to be raised by the trustees out of the rents of certain lands vested in them for a term for that purpose, by will reciting the power, proceeded:—"*And,* I give," &c. certain legacies, amounting to the precise sum, to certain persons, sometimes to individuals and their heirs, and sometimes to other persons by substitution; directing further, that, as to all such real estates as she had power to dispose of under her settlement, whether land or money, the same should descend to her daughter by the preferable title of descent; and subject as aforesaid, she gave all the residue of her personal estate to her said daughter.

The Court held, that, the question turning wholly upon the intention of the testatrix, the legacies were to be taken, not as general legacies, but as an execution of the power, under a mistake that such power was not restricted to the event of her dying without issue.

DOE *d.* SMITH *v.* BIRD, M. T. 1833. K. B. 2 *N. & M.* 679.

Under circumstances, a will need not refer to the power, but must use proper words to pass the estate.

A POWER was contained in surrenders of the copyholds of the wife, notwithstanding her coverture, and which she afterwards, and when not under coverture, executed by will, devising in general terms, and without referring either to the power or the subject of it.

The Court held, 1st, that such a clause in a surrender not being strictly a power, but only a mode of rendering the lands devisable, it was not essential that the will should refer to the surrender; and, 2ndly, that the words, "notwithstanding her coverture," were intended to enable her to make a will whilst married, and not to disable her if she should become sole, and that the power was therefore not restricted to the period of coverture; but lastly, that the will having been previously to the 55 Geo. 3, c. 192, and containing general words only, which could not be applied to copyholds, and there being freeholds on which it might operate, the statute did not apply to excuse the want of a surrender, and the copyhold did not pass.

WYNNE *v.* GRIFFITH, T. T. 1825. C. P. 3 *Bing.* 179.

Where an appointment is to be by deed, a deed of lease

LANDS were limited to such uses as four trustees should by their joint deed appoint; and they, by deed of lease and release, by way of marriage-settlement, granted, bargained, sold, released, and appointed the premises to L. in fee, on certain trusts, amongst

others, to raise portions; and they thereby covenanted that they were seised of the premises, thereby granted and released, for an absolute estate of inheritance, and also for further assurance of the premises thereby released, settled, or assured.

and release, by way of marriage settlement, is not a good execution.

The Court held, that, under the latter instrument, the legal estate did not vest in the grantees by an appointment according to the power.

DAVIES *v.* WILLIAMS, T. T. 1834. K. B. 3 *N. & M.* 821.

A SETTLOR having reserved to himself the power of appointing by will the settled estates, after the uses of the settlement were satisfied, devised all his real estate whatsoever and wheresoever, of or to which he or any others in trust for him were seised in possession, reversion, remainder, or expectancy, upon certain trusts; he also devised, in like terms, all leasehold premises, and his furniture, &c., and all other his real and personal estate whatsoever and wheresoever. The settlor was, at the time of his death, seised of the settled estates, and also of an estate in fee, not comprised in the settlement.

So, if the power omits the appointment of any one estate, it is not a sufficient execution.

The Court held, that it was not a sufficient execution of the power.

DOE *d.* DANIEL *v.* KEIR, H. T. 1829. K. B. 4 *M. & Ry.* 101.

A PARTY having an interest, and also a power, executed a deed manifesting an intention to execute the power, but which was inoperative as an execution of the power, by reason of something which was immaterial in itself.

An improper execution of a power may still enure as a conveyance.

The Court held, that it enured as a conveyance of the interest.

CHOLMELEY *v.* PAXTON, E. T. 1829. C. P. 5 *Bing.* 41; S. C. 1 *M. & P.* 127.

UPON an issue in formedon by a remainder-man, whether trustees, with a power by deed to sell and invest with consent of the party interested, had well executed the power, it appearing that part had been invested, but without such consent by deed, and the residue by the party interested, who also became a consenting party to an act of Parliament (the trustee having become non compos), reciting the previous investments, and appointing a new trustee—

A defective execution of a power is not aided by time.

The Court held, that the defective execution of the power was not cured by the lapse of time, as against a formedon; and that, upon the issue whether the money had been invested with the consent of the party, according to the conditions of the will, it was properly left to the jury to say whether it had been invested with such consent, manifested by deed.

III. RELATIVE TO LEASING POWERS.

DOE *d.* HARRIES *v.* MORSE, M. T. 1834. Ex. 2 *C. & M.* 247.

A POWER to tenant for life to lease for lives or years, reserving, "by half-yearly payments, the best and most approved yearly rents that can reasonably be obtained"—

The rent must be reserved at the time named in the power;

The Court held was not duly executed by a lease for lives, dated

the 11th of January, to hold from the 4th of January, "yielding and paying a yearly rent," upon the two most usual feasts or days of payment in the year; that is to say, the Feast of St. Philip and St. James the Apostles, and St. Michael the Archangel, (the 1st of May and the 29th of September), by even and equal portions, the first payment to begin and be made on the Feast of St. Philip and St. James the Apostles next ensuing the date thereof."

DOE *d.* WYTHE *v.* RUTLAND, T. T. 1837. Ex. 2 *M. & W.* 661.

but under a power of leasing at a yearly rent, it may be executed by making the rent payable at particular times.

TESTATOR, by his will, empowered the devisee for life to make a lease for twenty-one years, "so as, upon such lease, there be reserved and be made payable, during the continuance thereof, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease, and that in such lease there be contained a clause of re-entry for non-payment of rent. A lease was made under this power for twenty-one years, commencing on the 11th of October, 1833, at the yearly rent of £903, payable by equal half-yearly instalments; that is to say, on the 6th of April and the 11th of October in every year, by equal portions, except the last half-year's rent, which is hereby reserved and agreed to be paid on the 1st of August next before the determination of the term." The lease also contained a clause of re-entry for non-payment of rent, if forty-two days in arrear, and a covenant that the lessee might "use the barns and the stack-yards belonging to the demised premises, for the purpose of threshing and dressing the corn, grain, and pulse which should be produced from the premises in the last year of the said term, until the 1st of August next after the determination thereof."

The Court held, that the lease was a good execution of the power.

DOE *d.* DOUGLAS *v.* LOCK, E. T. 1835. K. B. 4 *N. & M.* 807; S. C. 2 *Ad. & E.* 705.

Where the power of leasing is to be exercised similar to that contained in another lease in A., an omission of an important clause avoids the power.

A LEASING power in a will, as to one class of premises, was conditioned, "so as that the ancient and accustomed yearly rent and other reservations be thereby reserved;" and there was also a general clause, applicable to all the devised premises, that the leases should be granted "in the same manner and form, and with and under such and the like reservations, as are usually and customarily contained in leases of the same kind in P."

The Court held, first, that, as applicable to the latter provision, leases of other premises in P. were admissible in evidence; and that, for the purpose of ascertaining the ancient rent and reservations, the rent reserved upon the last leases at the time when the power was reserved was to be deemed the ancient rent, but that it was to be reserved with all the beneficial circumstances; and therefore, as the previous lease contained exceptions as to wood larger than the latter leases, that the premises could not be taken to have been demised at the ancient rent, &c., and that such leases were void.

DAYRELL *v.* HOARE, T. T. 1840. Q. B. 4 *P. & D.* 114.—S. P. FRYER *v.* COOMBS, T. T. 1840. Q. B. 4 *P. & D.* 119, n.; S. C. 11 *Ad. & E.* 403.

A WILL contained the following leasing power, "That it should be lawful for all the persons to whom an estate for life was thereby given in the estates, hereditaments, and premises demised, when they should be in possession, by any deed indented, to demise or grant leases in possession of the several estates, hereditaments, and premises so given, or any part or parts thereof, for any term not exceeding twenty-one years, at the best rent, &c., and so as such rent should be incident to the reversion and remainder." A tenant for life granted a lease for fifteen years of a messuage, land, and premises, with the appurtenants, being parcel of the estates and hereditaments devised, "together with full liberty for the lessee, his executors, and administrators, and his and their friends, in his or their company, or with his or their permission, and to and for his or their gamekeeper or servant employed in that or the like capacity, at all seasonable times of the year, to hunt, course, shoot, and fish in, over, and upon the said thereby demised premises, and also over any other of the farms, lands, and grounds whatsoever of him the lessor."

The Court held, that this was not a good execution of the power.

And under a power to demise part, granting with that part the right to shoot over the whole, is bad.

DOE *d.* ROGERS *v.* ROGERS, M. T. 1833. K. B. 2 *N. & M.* 550.

TENANT for life, with a power to lease for seven years, to commence from the day of her decease, "so as there be reserved the best rent which could be gotten for the same, without taking any premium for the making thereof," made a lease for seven years, to commence from the day of her decease, in which the lessee covenanted to provide meat, drink, and lodging for three of the lessor's children, at a small sum per annum, and for one without any remuneration.

The Court held, that evidence was admissible to shew that the rent reserved was the best rent which could be gotten, and to shew that the covenants were not for the benefit of the lessor.

Where a leasing power directs the best rent to be obtained, evidence may be adduced to shew that fact.

IV. RELATIVE TO THE RIGHTS OF APPOINTOR.

NOEL *v.* HENLEY, E. T. 1835. Ex. 1 *M. & Y.* 302.

TENANT for life of personal funds, with a power to appoint the funds after his death among his children, and also with a power to appoint in his lifetime any part, not exceeding one half of the portion of each child, for the advancement of such children respectively, granted an annuity, secured by an assignment of the whole of the dividends and interest to which he was entitled for life.

The Court held, that he had thereby precluded himself from exercising the power for advancement, as he was not at liberty to lessen the security for the annuity by diminishing the fund from which the annuity was to arise.

Tenant for life, with power of appointment, cannot diminish the principal fund.

V. RELATIVE TO THE DESTRUCTION OF.

TYRRELL *v.* MARSH, E. T. 1825. C. P. 3 *Bing.* 31.

Levying a fine does not destroy a power, if that be not the intention of the parties.

AN estate was limited by marriage-settlement in tail, with power to the husband and wife to charge the estate during their lives, and a power to the trustees in whom the legal estate was vested to sell on the direction of the husband and wife or survivor; and they borrowed a sum by way of annuity, created a term of 1000 years, and levied a fine to E., with a deed declaring the uses to be in trust to secure the regular payment of the amount and to sustain the term—

The Court held, that the fine did not extinguish the trustees' power to sell, the intention of the parties being to limit the operation of the fine, and to prevent the destruction of the power.

DOE *d.* WIGAN *v.* JONES, H. T. 1830. K. B. 10 *B. & C.* 459.

And a judgment and elegit thereon does not defeat a prior appointment.

A CREDITOR obtained judgment against his debtor. Subsequently the debtor took freehold property by indentures of lease and release. The conveyance ran in the usual form, with uses to bar dower, and with a life estate, and a power of appointment to the purchaser. The purchaser afterwards exercised his power of appointment in favour of another person. Subsequently to all this, the judgment-creditor sued out an elegit, and obtained possession, through the sheriff's inquisition.

The Court held, that, although the judgment attached in the first instance upon the life estate of the debtor, that life estate became defeated by the subsequent exercise of the power of appointment; and that the judgment-creditor could not maintain the possession against the person in whose favour the power of appointment was executed.

VI. RELATIVE TO BANKRUPTS AND INSOLVENTS.

BADHAM *v.* MEE, T. T. 1831. C. P. 1 *M. & Scott,* 14; S. C. 8 *Bing.* 695.

A bankrupt, after assignment to his assignees, cannot execute a power.

MARRIAGE settlement to the use of M. for life; remainder to the use of trustees to preserve, &c.; remainder to the use of such one or more of the sons of M. on the body of the wife, and for such estates, &c., as M. should by deed or will appoint; remainder to use of first son and other sons of M. on the body of the wife in tail; with the ultimate remainder to the use of the heirs of M. The marriage takes place; there are two sons; the wife dies; a commission of bankrupt is issued against M., and the commissioners execute a bargain and sale to the assignees, who, with M., by lease and release, convey to P. M. in fee. Afterwards M., by deed-poll, appoints in favour of his elder son R. M. in fee.

The Court held, that R. M. took no estate under the appointment.

JONES *v.* WINWOOD, T. T. 1838. Ex. 3 *M. & W.* 653.

But a power to husband and wife is not well executed by the husband alone to his assignee.

BY lease and release of the 27th and 28th of December, 1819, certain lands were settled to such uses as D. and his wife should at any time or times, and from time to time during their joint lives, by deed or other instrument in writing duly executed, direct and appoint, and in default of and until such appointment to the use of D. for life, with remainder to trustees to preserve &c., and then to the use of his wife for life, and again, in like manner, to the use of his sons in succession in tail general, and then to the use of his daughters in tail general, with cross-remainders, and with remainder in fee to D. In June, 1824, D. took the benefit of the Insolvent Act, and conveyed to the provisional assignee all his interest in the premises, which was subsequently transferred, in the usual way, by him to J., the assignee of the estate. D. and his wife, in 1828, in execution of their joint power of appointment, conveyed, by lease and release, the premises to B. in fee, upon trust for the creditors of D.

The Court held, that the power was not destroyed by the conveyance to the provisional assignee.

VII. RELATIVE TO TRUSTEES*.

Practice.

I. OF THE AUTHORITY TO SUE AND DEFEND. See tit. *Attorney.*

II. OF THE FORM OF ACTION TO BE ADOPTED. See tit. *Action,* and particular heads according to subject-matter.

III. OF THE PARTIES TO THE ACTION. See particular titles.

IV. OF THE TIME WITHIN WHICH ACTIONS SHOULD BE BROUGHT. See tits. *Limitations, Statute of—Time,* and particular titles according to subject of actions.

V. OF THE NOTICE OF ACTION. See tit. *Action, Notice of.*

* Where lands are conveyed by settlement to trustees in fee upon the trusts of the settlement, with power of sale with consent of tenant for life during his life, and after his death at the discretion of the trustees for the time being:—Held, that the trustees, with consent of the proper parties, might, during the life of the tenant for life, make a valid lease and assurance. (*Boyce* v. *Hanning,* H. T. 1832, Ex., 2 C. & J. 334; S. C. 2 Tyrw. 327).

VI. OF THE DEFENDANT BEING ARRESTED OR SERVED WITH PROCESS. See tits. *Arrest—Process.*

VII. OF THE DIFFERENCE IN FORM BETWEEN BAILABLE AND SERVICEABLE PROCESS. See tit. *Process.*

VIII. OF HOW DEFENDANT IS TO BE SERVED WITH PROCESS. See tits. *Distringas—Process.*

IX. OF THE AFFIDAVIT OF DEBT. See tit. *Affidavit of Debt.*

X. OF ARRESTING DEFENDANT, AND DUTY OF THE SHERIFF AND HIS OFFICERS THEREON. See tits. *Arrest—Sheriff.*

XI. OF MAKING DEPOSIT IN LIEU OF BAIL ON ARREST. See tit. *Deposit in lieu of Bail.*

XII. OF THE BAILBOND. See tit. *Bailbond.*

XIII. OF IMPRISONING DEFENDANT AND DETAINING HIM IN CUSTODY. See tits. *Arrest—Detainer—Prisoner—Process.*

XIV. OF APPEARANCE. See tit. *Appearance.*

XV. OF SPECIAL BAIL, OR BAIL TO THE ACTION. See tit. *Bail.*

XVI. OF PROCEEDING ON BAILBOND, IF BAIL BE NOT PUT IN AND PERFECTED. See tits. *Bailbond—Sheriff.*

XVII. OF PROCEEDING AGAINST SHERIFF TO RETURN THE WRIT AND BRING IN THE BODY. See *Body-rule—Rules and Motions—Sheriff.*

XVIII. OF THE DECLARATION, TAKING DECLARATION OUT OF THE OFFICE, TIME TO DECLARE AND RULING PLAINTIFF TO DECLARE, NON PROS. FOR WANT OF DECLARATION. See tit. *Declaration—Non Pros., Judgment of.*

XIX. OF THE TIME TO PLEAD, OF NOTICE TO PLEAD, OF RULE TO PLEAD, OF DEMAND OF PLEA. See tit. *Pleas.*

XX. OF MOTIONS AND RULES. See tits. *Rules, Motions, and Summons.*

XXI. OF SUMMONS AND ORDERS. See tits. *Judge's Order—Rules, Motions, and Summons.*

XXII. OF SETTING ASIDE PROCEEDINGS FOR IRREGULARITY. See tit. *Setting Aside and Staying Proceedings.*

XXIII. OF STAYING PROCEEDINGS. See tit. *Setting Aside and Staying Proceedings.*

XXIV. OF OBTAINING SECURITY FOR COSTS. See tit. *Costs.*

XXV. OF OBTAINING PARTICULARS OF PLAINTIFF'S DEMAND, PARTICULARS OF BREACHES OF COVENANT, OF PREMISES IN EJECTMENT. See tits. *Covenant—Ejectment —Particulars of Demand.*

XXVI. OF CRAVING AND GRANTING OYER OF THE DEEDS. See tit. *Oyer.*

XXVII. OF INSPECTION OF COPIES OF INSTRUMENTS NOT UNDER SEAL, &c. See tits. *Evidence—Inspection.*

XXVIII. OF PAYMENT OF MONEY INTO COURT. See tit. *Payment of Money into Court.*

XXIX. OF CHANGING THE VENUE. See tit. *Venue.*

XXX. OF STRIKING OUT COUNTS FROM DECLARATION. See tit. *Declaration.*

XXXI. OF PLEAS, TIME OF PLEADING. See tits. *Abatement, Pleas in—Pleas.*

XXXII. OF JUDGMENT OF NON PROS. FOR NOT DECLARING. See tit. *Non Pros., Judgment of.*

XXXIII. OF RULING DEFENDANT TO ABIDE BY PLEA (abolished). See tit. *Plea.*

XXXIV. OF JUDGMENT BY DEFAULT. See tits. *Cognovit —Judgment—Warrant of Attorney.*

XXXV. OF WRIT OF INQUIRY. See tit. *Inquiry, Writ of.*

XXXVI. OF DISCONTINUANCE. See tit. *Discontinuance.*

XXXVII. OF NOLLE PROSEQUI. See tit. *Nolle Prosequi.*

XXXVIII. OF REPLICATION AND SUBSEQUENT PLEADINGS. See tits. *Rejoinder—Replication—Surrejoinder, &c.*

XXXIX. OF DEMURRER. See tit. *Demurrer.*

XL. OF AMENDMENT. See tit. *Amendment.*

XLI. OF ISSUE IN FACT. See tit. *Issue.*

XLII. OF ISSUE IN NUL TIEL RECORD. See tits. *Nul tiel Record—Record.*

XLIII. OF NOTICE OF TRIAL. See tit. *Trial.*

XLIV. OF JUDGMENT AS IN CASE OF NONSUIT. See tit. *Nonsuit, Judgment as in Case of.*

XLV. OF THE JURY AND JURY PROCESS. See tit. *Jury.*

XLVI. OF MAKING UP AND PASSING THE RECORD. See tit. *Trial.*

XLVII. OF ENTERING THE CAUSE FOR TRIAL. See tit. *Trial.*

XLVIII. OF PUTTING OFF THE TRIAL. See tit. *Trial.*

XLIX. OF SUBPŒNAING WITNESSES. See tit. *Witness.*

L. OF THE TRIAL AND ITS INCIDENTS. See tits. *Trial—Trial, Writ of.*

LI. OF THE VERDICT. See tit. *Verdict.*

LII. OF NONSUIT. See tit. *Nonsuit.*

LIII. OF THE POSTEA. See tit. *Postea.*

LIV. OF THE JUDGE'S CERTIFICATE FOR IMMEDIATE EXECUTION. See tit. *Execution.*

LV. OF THE RULE FOR JUDGMENT. See tit. *Judgment.*

LVI. OF NEW TRIAL. See tit. *New Trial.*

LVII. OF MOVING IN ARREST OF JUDGMENT. See tit. *Judgment, Arrest of.*

LVIII. OF ENTERING UP AND DOCKETING JUDGMENT. See tit. *Judgment.*

LIX. OF RELATION OF JUDGMENTS. See tit. *Judgment.*

LX. OF EXECUTIONS. See tit. *Execution.*

LXI. OF SCI. FA. OR ACTION OF DEBT AGAINST BAIL. See tit. *Bail.*

LXII. OF WRITS OF ERROR. See tit. *Error, Writ of.*

LXIII. OF ATTACHMENTS. See tit. *Attachment.*

LXIV. OF WARRANT OF ATTORNEY AND COGNOVIT. See tits. *Cognovit—Warrant of Attorney.*

LXV. OF PROCEEDINGS IN EXCHEQUER ON CAUSES REMOVED FROM GREAT SESSIONS. See tit. *Wales.*

LXVI. OF PARTICULAR FORMS OF ACTION. See tit. according to form of action.

LXVII. OF PROCEEDINGS AGAINST PARTICULAR PERSONS. See tits. according to description of particular parties.

LXVIII. RELIEF UNDER INTERPLEADER ACT. See tits. *Interpleader—Sheriff.*

Prerogative of the Crown.

ALCOCK *v.* COOKE, M. T. 1838. C. P. 5 *Bing.* 340.

If the King grants that which he cannot it will be presumed he was deceived.

A GRANT of property of the Duchy of Lancaster then out on lease, which was not recited in the grant—

The Court held void, notwithstanding a user under the grant from 1631 to 1760, as the King must be taken to be deceived when he grants that which he cannot give according to the terms of the grant.

STRUTHETT *v.* BLYTHE, T. T. 1830. K. B. 1 *B. & Ad.* 509.

A charter, imposing duties on vessels passing near a certain place, does not apply to the Crown.

THE Crown, by charter originally reserving a rent, afterwards confirmed and perpetuated by statute, gave authority to collect duties from every vessel passing within certain limits, except ships of war belonging to the Crown, and imposing a certain payment by the postmaster-general in respect of certain packets.

The Court held, that, independently of the exception, other vessels belonging to the Crown would not be liable to pay the tolls; the exception could not give a greater effect to the grant than its terms admitted of, and appearing only to have been inserted for greater caution, it did not render post-office packets belonging to the Crown liable.

WILLIAMS *v.* WILCOX, T. T. 1838. Q. B. 8 *Ad. & E.* 314.

The Crown cannot make a grant of a public river in derogation of the public right.

TRESPASS for pulling down a wear. Plea, that it was wrongfully erected on a part of a navigable river, and impeded the navigation, wherefore the defendants removed it. Replication, that the part was distinct from the channel of the river, and that the part where the wear stood was not a navigable river. Rejoinder, that it was a

part of the river navigable when the channel of the river was choked up, which was alleged to have been choked up at the time when &c. In the surrejoinder the plaintiff traversed this right.

The Court held, that the King had no power at common law to authorize the obstruction of a navigable river by the erection of a wear. But all such wears as were erected before Magna Charta were legalized by that and the subsequent statutes; however, the Crown could not make the grant of a public river in derogation of the public right.

SCRATTON *v.* BROWN, T. T. 1825. K. B. 4 *B. & C.* 485; S. C. 6 *D. & R.* 536.

A grantee of the Crown of the "sea-shore" is entitled to the accretions by imperceptible increase.

UNDER a conveyance by the grantee of the Crown of land lying between high and low water mark—

The Court held, 1st, that, under the terms, "sea-grounds, oyster layings, and shores and fisheries," the soil and not a mere easement passed; and that the term "fishery" did not qualify or limit the effect of the former words, which were sufficient to pass the soil; and, 2ndly, that accretions by imperceptible increase passed as incident to the land which belonged to the grantee. A grant by the Crown of the "sea shore" conveyed, not that which at the time merely was between the high and low water marks, but that which from time to time shall be between those termini.

DUKE OF GRAFTON *v.* LONDON AND BIRMINGHAM RAILWAY COMPANY, M. T. 1838. C. P. 6 *Scott*, 719; S. C. 5 *Bing. N. S.* 27.

A grant by the Crown of land in tail to an illegitimate child is barred by a bargain and sale enrolled under the 3 & 4 Will. 4, c. 74, s. 15.

BY letters patent, King Charles the Second, in the twenty-fifth year of his reign, in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son, H. F., afterwards created Duke of Grafton.

The Court held, that an estate tail, granted by Charles the Second to his illegitimate son, an infant of the age of nine years, is not within the 34 & 35 Hen. 8, c. 20; consequently, all other estates tail and remainders and reversions thereupon expectant or depending, whether vested in or belonging to the King, or to any other person, may be barred by the 15th section of the 3 & 4 Will. 4, c. 74, by bargain and sale enrolled.

LAMBERT *v.* TAYLOR, E. T. 1825. K. B. 4 *B. & C.* 138.

Choses in action of a felo de se vest in the Crown, and the assignee of the Crown may sue, and is not barred by the Statute of Limitations.

IN an action by the grantee of the Crown for a debt due on a promissory note, given by defendant to a party found by a coroner's inquest felo de se—

The Court held, 1st, that a second inquisition, taken before the sheriff upon the writ of melius inquirendum, was an office of instruction only, and not of entitling, the title of the Crown accruing upon the finding of the coroner; the second, therefore, need not be produced at the trial; 2ndly, that a debt or chose in action, vested in the Crown, is assignable at law, and may be granted under the sign manual only; 3rdly, that such debt and security passing to the Crown by the felony was assignable without indorsement, such assignment taking effect by operation of law, and not by the custom of merchants, or other custom; 4thly, supposing it necessary, in

order to vest the chattels of a felo de se in the Crown, that the inquisition must be found by twelve jurors, it must be taken after verdict to have been so found; and lastly, that a plea that the note became due and payable in the lifetime of the party, and that the supposed causes of action did not accrue within six years before the exhibiting of the bill, was bad in law, not shewing that he was barred at the time of his death; for if not so barred, then a right vested in the Crown, and was not affected by the statute; the plea also confessing a cause of action, and not well avoiding it, the plaintiff held entitled to judgment non obstante veredicto.

Prescription.

See tits. *Common—Easement—Trespass—Way.*

PARKER *v.* MITCHELL, E. T. 1840. Q. B. 11 *Ad. & E.* 788; S. C. 3 *P. & D.* 655.

The twenty years under 2 & 3 Will. 4, c. 71, must be continuous*.

TRESPASS for breaking and entering the plaintiff's close. Pleas, not guilty, and two pleas under the stat. 2 & 3 Will. 4, c. 71, s. 2, justifying, under a right of way, that the defendant and others, the occupiers, had enjoyed without interruption, over the locus in quo, to a certain common, at all seasonable times of the year, for the purpose of procuring peat, for the period of twenty and forty years respectively. There was no plea of immemorial user.

Per Cur.—Under the statute 2 & 3 Will. 4, c. 71, s. 2, proof of twenty years' enjoyment of a right of way is not complete, unless an enjoyment for that full period be shewn down to the time of bringing the action. Such a plea, therefore, is not to be sustainable where no user was shewn for five years immediately preceding the action.

Principal and Accessory†.

* See 2 & 3 Will. 4, c. 71, "An Act for shortening the Time of Prescription in certain Cases."

A plea of prescription of sole and several right of pasturage in a close is good; and parties are equally entitled to hold the right from a party whether claiming under him by deed or descent. (*Welcome* v. *Upton*, E. T. 1840, Ex., 6 M. & W. 536).

† An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried; and he is not now triable under 7 Geo. 4, c. 64, s. 9, for that section is not to be taken to make accessories triable except in cases in which they might have been tried before. (*Rex* v. *Russell*, 1832, 1 Moo. C. C. 356). It is sufficient to make a party liable as an accessory after the fact, if he employ another to resist and assist in the escape of the principal. (*Rex* v. *Jarvis*, 1836, N. P., 2 M. & Rob. 40). Persons who are present at a prize-fight, and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault as well as the actual combatants; and it is not at all material which of the combatants struck the blow. (*Rex* v. *Perkins*, 1831, N. P., 4 C. & P. 537). A., a lad, who was a clerk in a banking-house, robbed his employers, and, after doing so, he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings, and, after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America:—Held, that on this evidence B. might be convicted as an accessory

Principal and Agent.

See also tits. *Bills and Notes—Bond—Deed—Joint Stock Company—Partner—Set-off.*

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III. RELATIVE TO THE AUTHORITY AND DUTY OF AN AGENT, AND OF HIS RIGHT TO PLEDGE.

(*a*) Authority and duty of.

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2. *To distrain*, p. 231.
3. *As to Sales*, p. 231.
4. *As to Payments*, p. 232.
5. *Continuance of Authority*, p. 232.

(*b*) As to his right to pledge, p. 233.

IV. RELATIVE TO THE RIGHTS OF THE PRINCIPAL, p. 234.

V. RELATIVE TO THE LIABILITY OF THE PRINCIPAL, p. 235.

after the fact, in harbouring, receiving, and maintaining the principal felon. (*Rex* v. *Lee*, 1834, N. P., 6 C. & P. 536). But a person cannot be tried for inciting another to commit suicide, although that other commit the suicide. (*Reg.* v. *Leddington*, 1839, N. P., 9 C. & P. 79).

If an indictment against a receiver state the principal felony to have been committed by A. B., whatever would have been evidence of the principal felony to convict A. B. is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if A. B. confessed the principal felony, that confession is admissible, on the trial of the receiver, to prove the commission of the principal felony. (*Rex* v. *Blick*, 1830, N. P., 4 C. & P. 377).

An indictment stated that a certain evil-disposed person stole certain goods; that L. C. incited him to do so; that E. C. did the same; that E. M. received a portion of the property, knowing it to have been stolen; it also charged A. A. nd the before-mentioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all, except L. C., who was merely charged as accessory before the fact, and judgment was given upon the charges of receiving only. (*Reg.* v. *Caspar*, 1839, N. P., 9 C. & P. 289; S. C. 2 Moody, C. C. 101).

Where a prisoner and another (a child) were charged in the same indictment, the latter with stealing, the former with inciting him to commit the felony, the Judge, with a view to admit the child as a witness, after pleading, allowed him to withdraw his plea, and plead guilty, and after a nominal sentence to be examined. (*Reg.* v. *Lyons*, 1840, C. C. C., 9 C. & P. 555).

To substantiate the charge of harbouring a felon, it must be shewn that the party charged did some act to assist the felon personally. (*Reg.* v. *Chapple*, 1840, C. C. C., 9 C. & P. 355).

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VII. RELATIVE TO CONTRACTS BETWEEN, p. 237.

VIII. RELATIVE TO CHARGING A PARTY AS PRINCIPAL OR AGENT, AND OF THE AGENT'S RIGHT TO CLAIM AS PRINCIPAL, p. 237.

IX. RELATIVE TO THE AGENT'S COMMISSION, p. 238.

X. RELATIVE TO THE DISMISSAL OF THE AGENT, p. 239.

XI. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) What actions are or are not maintainable, p. 239.

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I. RELATIVE TO WHO MAY BE CONSIDERED AS AN AGENT.

Flemyng *v.* Hector, E. T. 1837. Ex. 2 *M.* & *W.* 172.

The committee of a club are not such agents as to render other members liable*.

By reference to the rules of a club, it appeared that the intention of the members was to provide funds to be administered by the committee, and to provide the means of carrying it on, without the necessity of dealing on credit.

The Court held, that, if the committee chose to enter into contracts without sufficient funds, they could not pledge the credit of the individual members to render them liable for goods supplied for the use of the club.

II. RELATIVE TO THE APPOINTMENT OF AN AGENT.

Woodin *v.* Burford, H. T. 1834. Ex. 2 *C.* & *M.* 391.

An agent not authorized cannot bind his principal†;

The defendant's servant was sent to deliver a horse, sold by the defendant to plaintiff, and who, after making certain statements, signed a receipt for the price, containing a warranty.

* If the attorney of a party authorize A. to pay money for his client, and A. pay it, and the attorney mention the matter to his client, who does not disclaim the transaction till several months after, this is evidence to go to the jury that the authority to pay was authorized by the client. (*Parker* v. *Dubois*, M. T. 1835, N. P., 7 C. & P. 406). An authority by a client to his attorney to pay money does not require any stamp. (*Id.*) If money is ordered to be paid to a certain person (not an attorney) or his agent, the demand must either be made by himself or some one authorized by a power of attorney. (*Brown* v. *Jenks*, H. T. 1836, B. C., 4 D. P. C. 581).

† Upon a review of the language of the several statutes relating to brokers,

The Court held, that having no authority to give the warranty, the principal was not bound, either by the statements or the receipt.

ACEBAL *v.* LEVY, H. T. 1834. C. P. 10 *Bing.* 378; S. C. 4 *M. & Scott,* 217.

but an authority even to sign may be by parol;

IN this case—

The Court said, that an authority for an agent to sign for his principal may be conferred orally as well as by writing.

MACLEAN *v.* DUNN, E. T. 1827. C. P. 4 *Bing.* 722.

and he need not be authorized at the time of the contract.

ON a question as to an agent being duly authorized—

The Court said, it is not necessary that the agent should have his authority at the time of his entering into the contract for his principal; where, therefore, the latter subsequently ratified a purchase made by an agent without authority, the former was an agent within the Statute of Frauds.

WITHINGTON *v.* HEMING, M. T. 1828. C. P. 5 *Bing.* 442.

A party is not bound to call on an agent to produce his authority.

A LETTER, authorizing an agent to draw to a certain amount, coupled with a power of attorney to enter into and complete contracts, make purchases, &c. in the largest terms—

The Court held a sufficient authority to such agent to raise money for the purposes of his employers; and that a party advancing monies to that agent was not bound to call for those instruments, and inquire what money had been already advanced on the letter.

III. RELATIVE TO THE AUTHORITY AND DUTY OF AN AGENT, AND OF HIS RIGHT TO PLEDGE.

(*a*) AUTHORITY AND DUTY OF.

1. *In general.*

WATERS *v.* BROGDEN, T. T. 1827. Ex. 1 *Y. & J.* 457.

A principal is not bound by an act of his agent not corresponding with his authority*.

THE defendant, residing at T., gave a cheque to his bailiff to pay for cattle, which the latter at the request of the payee got discounted with the plaintiffs, who were bankers at C., about twelve miles from L., the banking-house of the parties on whom the cheque was drawn

held that a shipbroker was not a broker within them so as to be precluded from sustaining an action for brokerage, he not having been admitted in the Mayor's Court. (*Gibbons* v. *Mill,* E. T. 1827, C. P., 4 Bing. 301).

* An agent empowered to let and receive rents has authority to determine the tenancy. (*Doe* v. *Mizen,* 1836, N. P., 2 M. & Rob. 56). But, it seems, an authority to recover a debt does not extend to opposing the discharge of the party under the Insolvent Act. (*Drake* v. *Lewin,* M. T. 1834, Ex., 4 Tyrw. 750).

The agent of a branch bank has no right to agree to return a security. (*Bosanquet* v. *Forster,* 1841, N. P., 9 C. & P. 659).

and at which place it was dated, and the plaintiffs kept the cheque for five days without presenting, when the bankers at L. stopped payment.

The Court held, that, the cheque not being dated at the place where issued, it was inadmissible in evidence, and the plaintiffs could not be guilty of laches in omitting to present it; but that, it being the duty of the bailiff to have delivered it to the person for whose benefit it was drawn, he could not without express authority bind his principal so as to create a privity between the plaintiffs and defendant, so as to entitle the former to maintain assumpsit for the money advanced for the cheque.

CROSSKEY *v.* MILLS, T. T. 1834. Ex. 1 *C., M. & R.* 298.

An agent is not bound to obey notice from a third party not to pay over money unless he has a legal right.

THE plaintiff, a creditor of an intestate, who had executed a bill of sale of all his effects to him, employed the defendant to sell them.

The Court held, that he could not refuse to pay over the amount, and set up a jus tertii, as that he had received a notice from the widow not to pay over, but to retain the proceeds for the benefit of the creditors, it appearing that no letters of administration had been taken out by her or any other person.

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2. *To distrain.* See, also, tit. *Distress.*

SMITH *v.* BIRMINGHAM GAS COMPANY, T. T. 1834. K. B. 1 *Ad. & E.* 526.

An agent to a company can distrain, though not authorized by deed.

IT appeared that the distress was made by an agent of the company, who was appointed by parol, and not under seal, when it was objected that he had no sufficient authority from the company to render them liable to an action in tort; but the Judge thought that, at common law, a corporation could appoint a bailiff for the purpose of making a distress by parol, and refused to nonsuit, reserving leave at the time to the defendants to move to enter a nonsuit.

Per Cur.—The act does not seem to contemplate its being given by deed. This is a case of that kind which does not require that it should be an appointment by deed.

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3. *As to Sales.*

MONK *v.* WHITTENBURY, T. T. 1831. K. B. 2 *B. & Ad.* 484; S. C. 2 *M. & M.* 81.

A sale by an authorized agent is not protected under 6 Geo. 4, c. 90, unless an agent within that statute*.

FLOUR was sent to a wharfinger for the mere purpose of custody, who transacted business also as a flour-factor with some persons, and he sold the flour to the defendant, and absconded.

The Court held, that he was not to be considered an agent entrusted with goods, within the meaning of 6 Geo. 4, c. 90, s. 4,

* An agent, authorized to sell goods, has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. (*Capel* v. *Thornton*, T. T. 1828, N. P., 3 C. & P. 352).

In an action by a party who bargained with a broker for the sale of goods be-

and the defendant therefore not protected, although not apprized at the time that the goods belonged to the plaintiff, and that the wharfinger had no authority to sell.

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4. *As to Payments.*

WARNER *v.* M'KAY, T. T. 1836. Ex. 1 *M. & W.* 591; S. C. 1 *T. & G.* 965.

Payments to an agent may bind his principal*;

FACTORS sold goods to the defendant in their own names to cover a demand, and afterwards upon other sales communicated their principals, and made out the invoices as factors, and the defendant made payments to them without appropriating them to one or other of the sales; the jury found that the defendant had notice that the goods were the plaintiffs', but was not bound to make further inquiry.

The Court held, that he was entitled to consider the payments to the factors as made on account of the plaintiffs, and to set them off in an action by the owners for goods sold and delivered.

SYKES *v.* GILES, M. T. 1839. Ex. 5 *M. & W.* 645.

but an agent, an auctioneer, has no right to receive a bill in payment without express authority.

ON a sale of timber by auction, the purchaser being by the conditions of sale to pay down a deposit, and the remainder of the purchase-money by a given day, and, if desirous to pay before that day, to be allowed a discount, and, if required, to enter into an agreement and bond, with one or more securities, for the performance of such conditions; the defendant, as the purchaser, a few days after the sale gave a bill, dated on the day of the sale, at six months, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted, on his own account, and it was duly paid.

The Court held this not a valid payment under the agreement of purchase, the auctioneer not being authorized to receive payment by a bill.

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5. *Continuance of Authority* †.

longing to a third person, for assuming the right to sell without having authority, in order to make out a contract for the sale, it is not necessary in point of law that there should be bought and sold notes. (*Pauli* v. *Simes*, T. T. 1834, N. P., 6 C. & P. 506).

* A traveller who receives orders for goods from his employer's customer in the country is authorized to receive payment for them in money, but not in other goods. (*Howard* v. *Chapman*, T. T. 1831, N. P., 4 C. & P. 508).

† Where the plaintiff, after repeated applications for payment to the defendant, and receiving no answer, had applied for payment to an attorney, supposed to act for the defendant, who answered the letter, and paid part, and to a subsequent letter replied, promising payment of the remainder:—Held, that, if it appeared he was the agent at one time, it was evidence to go to the jury that he continued so. (*Roberts* v. *Gresley*, T. T. 1828, N. P., 3 C. & P. 380).

(*b*) As to his right to pledge.

Fletcher *v.* Heath, M. T. 1827. K. B. 7 *B. & C.* 517; S. C. 1 *M. & Ry.* 335.

A broker having accepted bills for F., on the security of silks and East India warrants then in his hands, pledged them to the defendant, with notice of his agency, but without informing his principal.

Under 6 Geo. 4 an agent cannot pledge beyond his own right to detain*.

The Court held, that, having himself only a right to hold such warrants as an indemnity for his acceptances, his pledgee could, under 6 Geo. 4, c. 94, s. 5, have no greater right than he had; and the plaintiff, having satisfied those acceptances, was entitled to receive back the warrants, and maintain trover for them.

Haynes *v.* Foster, M. T. 1833. Ex. 2 *C. & M.* 237; S. C. 4 *Tyrw.* 65.

The plaintiffs placed bills in the hands of a broker, to procure them to be discounted—

And an agent who receives a bill to discount has no right to place it with his own and pledge it;

The Court held, that the broker had no authority to mix them with his own, and deposit them as a security for advances to him, and still less for advances previously made; and the defendant, the pledgee, having received the bills of the broker as a security, partly for a past advance, and partly for an advance then made, without any inquiry made as to the authority of the broker, was, upon the bankruptcy of the broker, liable to the plaintiff for the amount.

Reid *v.* Hollinshead, M. T. 1825. K. B. 4 *B. & C.* 867; S. C. 7 *D. & R.* 444.

The plaintiffs directed their broker to purchase cotton, in which he was allowed one-third interest, he acting in the business free of commission. He also insured the goods and deposited them in warehouses, of which he kept the key, for their joint security, and throughout every part of the correspondence relative to the goods the transaction was referred to as a joint concern.

but an agent, quoad hoc a partner, may pledge.

* The 6 Geo. 4, c. 94, regulates the agent's right to pledge.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor, previous to the 1st of October, 1826, when the 2nd section of the 6 Geo. 4, c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself. (*Blandy* v. *Allan*, E. T. 1828, N. P., 3 C. & P. 447). And before 6 Geo. 4, c. 94, where plaintiffs consigned goods to persons as brokers, directing them to sell them at their own discretion, and stipulated that they should be at liberty to draw on them by way of advance:—Held, that the authority given to deal with the goods must be taken with reference to the character of factors only, and did not authorize them to pledge. (*Graham* v. *Dyster*, E. T. 1817, K. B., 6 M. & Selw. 1). So, where A., a factor, holding goods of B., with a lien on them, transferred them to C. as upon a sale:—Held, that the latter could not claim to hold them as a lien to the extent of A. and C.'s lien, under the 6 Geo. 4, c. 94, which only applies to the case of a pledge distinctly made by the factor. (*Thompson* v. *Farmer*, 1827, N. P., 1 M. & M. 48).

If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. and C. (*Garth* v. *Howard*, H. T. 1832, N. P. 5 C. & P. 346–350).

The Court held, that he was quoad hoc to be deemed a partner; and that, having pledged them, without fraud or collusion on the part of the pawnee, the latter was entitled to hold them as against his original employers.

IV. RELATIVE TO THE RIGHTS OF THE PRINCIPAL.

Curtis *v.* Barclay, H. T. 1826. K. B. 5 *B. & C.* 141.

Where an agent wrongfully detains goods the consignee may sue him, and the expenses are a charge upon the goods*.

The plaintiffs (consignees of goods) acting under an agreement to accept bills on the credit of bills of lading, and, after deducting advances, charges and commission, to pay over the surplus to a third party, were obliged, the captain wrongfully withholding the goods, to bring an action, which was eventually referred—

The Court held, that the plaintiffs being authorized by the bill of lading to act for the benefit of all concerned, and having a right for themselves and owing it as a duty to others to obtain the possession, the expenses so incurred, being without imputation, were a charge upon the goods.

Horsfall *v.* Fauntleroy, E. T. 1830. K. B. 10 *B. & C.* 755.

A principal who authorizes his broker to buy at a sale according to the conditions, is not bound by alterations at the sale of the conditions.

The plaintiffs, previously to the sale, issued catalogues, and, by one of the conditions of sale, payment was to be made on delivery by good bills on London, at four months from the date of the sale; one of the catalogues being sent to the defendants by their broker, they directed him to purchase certain lots, which he accordingly did in his own name, and immediately drew on the defendants for the amount, at four months, which they accepted and paid when due. It appeared that at the sale the terms of payment were varied to known purchasers to "payment two and two months," by which the broker was allowed to have the goods without giving bills at the time, and he subsequently became bankrupt. In an action against the defendants, as the real purchasers—

The Court held, that the defendants not having authorized any contract different from that mentioned in the conditions, viz. a payment on delivery by good bills, and on the faith of which they might properly accept bills, they were not bound by the contract varied at the sale, and the plaintiffs were not therefore entitled to recover.

Browning *v.* Aylwin, T. T. 1827. K. B. 7 *B. & C.* 204.

A sworn broker is agent for both

In an action against a sworn broker of the city of London for negligence in making a contract—

* If an agent, employed to sell coals, make a bargain in his own name with a tradesman to furnish him with coals on credit, for which, in return, he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the coals may recover the price of the tradesman, if his name be in the ticket sent with the coals as the seller, because the tradesman, after that, is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal. (*Pratt* v. *Willey*, T. T. 1826, N. P., 2 C. & P. 350).

Where the defendant, having been employed by the plaintiff as broker, undertook (as he was bound to do under 6 Anne, c. 16, s. 4) to charge him only the cost price of the goods purchased, and which he had violated in every instance:—Held, that the plaintiff was entitled to recover damages for such over-charges paid by him. (*Proctor* v. *Brain*, T. T. 1828, N. P., 3 C. & P. 536; S. C. 2 M. & P. 284).

The Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract as he is agent for both parties.

parties, who are entitled to examine his books.

V. RELATIVE TO THE LIABILITY OF THE PRINCIPAL.

ROBINSON *v.* READ, E. T. 1829. K. B. 9 *B. & C.* 449.

THE defendant, as owner, was clearly liable to the plaintiff for necessaries, &c. supplied for his ship and crew by the direction of the broker and agent, to whom the defendant entrusted the whole management, and the plaintiff, before the expiration of the credit, had applied to and received from the broker his acceptances for the amount, allowing discount, the latter having effects of the defendant's beyond the amount in his hands at the time. The bills were subsequently renewed, and the interest added.

A principal is liable on the bankruptcy of his agent, though the agent has funds in his house to pay*.

The Court held, that, upon the broker becoming bankrupt, and the bills remaining due, the defendant was not discharged by such bill transaction, having neither been misled nor prejudiced by it.

ATTORNEY-GENERAL *v.* SIDDON, M. T. 1830. Ex. 1 *C. & J.* 220; S. C. 1 *Tyrw.* 41.

IN debt for penalties—

The Court held, that although an information for penalties is a penal proceeding, yet it is also in the nature of a civil process to recover the Crown's debt; and a party therefore carrying on a trade by his servants, and deriving profits from their acts, is responsible for penalties incurred by their violation of the revenue laws.

A tradesman is liable for an act of his servant for penalties under the revenue laws.

VI. RELATIVE TO THE LIABILITY OF THE AGENT.

MAGEE *v.* ATKINSON, T. T. 1837. Ex. 2 *M. & W.* 441.

PLAINTIFF bought of defendants some railway shares, and a note of the contract signed in the defendants' name by their clerk was sent to the plaintiff. A second note was afterwards sent by defendants, saying "they sold the shares on account of H. I." Both notes were kept by the plaintiff. On an action brought for breach of the agreement in not completing the sale—

An agent who signs a contract without disclosing his principal, is personally liable†.

The Court held, that it was no misdirection to leave it to the jury

* Where defendant, a country shopkeeper, had, by previous dealings, authorized the plaintiffs to treat W. as his agent, and had actually authorized him as to part of the demand:—Held, that the defendant was answerable for the whole, although as to the particular demand he had given no such instructions. (*Todd* v. *Robinson*, H. T. 1825, N. P., 1 Ry. & M. 217).

† Where the office of clerk to a body of trustees was executed by a deputy:—Held, that the clerk was not responsible for losses occasioned by the negligence of such deputy, induced by the negligence of the trustees, nor for monies which came into his hands through their irregular accounts; but that he was for sums received at his office by such deputy without his authority, but which he had ground for believing would be paid there. (*Whitmore* v. *Wilks*, T. T. 1828, N. P., 1 M. & W. 214; S. C. 3 C. & P. 364).

to say which was the contract, and to tell them, that, if the defendants signed their own names, they were liable.

SHAW *v.* PICTON, M. T. 1825. K. B. 4 *B. & C.* 715; S. C. 7 *D. & R.* 201.

And an agent who allows his principal to lose his remedy is liable.

THE mutual agents of the grantor and annuitants obtained from the former advances, upon the application of their attorney to the grantor and his surety, as though at the instance of the annuitants—

The Court held, 1st, that the agents having, by such payments, suffered the annuitants to lose their remedy against the surety, were bound to apply the monies received to the payment of the arrears of those annuities; and 2ndly, that, having permitted the annuitants to draw, upon the faith of the annuities having been received, and having voluntarily taken upon themselves to give credit for the payment, they were not at liberty afterwards to say they had not been received.

STEWART *v.* ABERDEIN, T. T. 1838. Ex. 4 *M. & W.* 211.

And an agent who keeps a known running account between two principals, and occasionally settles, becomes the debtor.

AN insurance broker, or mercantile agent, was employed to receive money for another in the general course of his business, and the known general usage was for the agent to keep a running account with the principal, and to credit him with sums received by credits in accounts with the debtors, with whom he also kept running accounts, and an account was bonâ fide settled according to that known usage.

The Court held, that the principal was discharged, and the agent became the debtor according to the intention and with the authority of the principal.

LOHMAN *v.* RODGEMENT, H. T. 1840. C. P. 6 *Bing. N. S.* 253.

But an agent is not liable to refund on the failure of a principal.

THE defendants, merchants in London, were in the habit of purchasing goods for G., a merchant at Petersburgh, which they consigned to the plaintiff, his agent at Hamburgh, and they drew bills to the amount, pursuant to the credit established for them. In such course of business, they consigned Brazil sugars and indigo to the plaintiff for G., and other merchants at Petersburgh, and transmitted the bills of lading, and drew bills to the amount; upon which the plaintiff informed them that he protected their drafts to the amount of all the goods consigned to the merchants at Petersburgh, except those consigned to G.; that he accepted the draft for the amount of such goods provisionally, under the guarantie of the defendants, inasmuch as the sugars, against which the bill was drawn, were not, as ordered by his principal, Havannah, to the amount of which he was authorized to accept, but Brazil, respecting which he had no directions; that he would communicate with his principal on the subject, and inform the defendants of the result. Such communication being made, G., at Petersburgh, confirmed the order for the Brazil sugars, and directed the plaintiff to accept to their amount, and release the defendants from their guarantie. The plaintiff also informed the defendants of their drafts, drawn on him, against goods, being con-

firmed and acknowledged by other merchants at Petersburgh, for whose account they were drawn. Upon the bankruptcy of G., and an action by the plaintiff against the defendants for the amount of the bill which he had paid—

The Court held, that the plaintiff was to be considered as having accepted the bill, not for the account of the defendants, until he (the acceptor) was in funds; but, in reference to the confirmation of the order for the Brazil, instead of the Havannah sugars; which confirmation being given, his claim was upon the bankrupt at Petersburgh, not upon the defendants, against whom, consequently, no action could be maintained.

VII. RELATIVE TO CONTRACTS BETWEEN.

GAREY *v.* PIKE, E. T. 1839. Q. B. 2 *P. & D.* 427.

An agent who may account within six or twelve months cannot be sued until the end of the larger period*.

IN an action of assumpsit for cloths, &c., and proof of their having been supplied, the defendant put in an agreement between him and the plaintiff, that he should provide customers for the plaintiff, and be allowed a per-centage on their accounts, to be paid in cloths, as he should want them; and a settlement of accounts to take place every six or twelve months at the furthest.

The Court held, that it lay on the plaintiff to shew that a debt existed, and that a settlement of accounts had taken place; and that no action could be maintained until the end of twelve months.

VIII. RELATIVE TO CHARGING A PARTY AS PRINCIPAL OR AGENT, AND OF THE AGENT'S RIGHT TO CLAIM AS PRINCIPAL.

THOMSON *v.* DAVENPORT, H. T. 1829. K. B. 9 *B. & C.* 78.

The seller has his remedy against the agent or the principal, as soon as he is known.

ON a writ of error—

THE Court held, 1st, where a person sells goods to another, not knowing at the time that the buyer is an agent, the seller, upon afterwards discovering the principal, may resort to him for payment, although he had debited the agent; and he may recover against the principal, unless the latter has in the meantime paid the agent; but 2ndly, where the principal in such a case is living abroad, and the seller debits the agent, he will not in general be allowed afterwards to resort to the principal, it being presumed, until the contrary appear, that the seller gave credit to the English agent, and could not have done so to the foreign principal.

* Where the plaintiff had sent a written statement to the defendant's surveyor of the prices at which he would perform work, and the defendant afterwards, by a letter sent to his surveyor, consented to those prices, provided the amount were paid in portions, the first in November, and the surveyor shewed the letter to the plaintiff, and said he might consider the sum payable on the 1st of November, the Judge directed the jury to say whether such statement was part of the contract, or a mere observation of the agent. (*Knapp* v. *Harden*, H. T. 1835, N. P., 6 C. & P. 745).

EDWARDS *v.* SMITH, M. T. 1827. C. P. 12 *Moore*, 59.—S. P. STABER *v.* HAWKES, T. T. 1831. C. P. 5 *M. & P.* 549.—S. P. BOYSON *v.* COLES, E. T. 1817. K.B. 6 *M. & Selw.* 147.

It is for the jury to say whether the party acted as agent or principal.

THE plaintiff sold cattle to M., a bailiff of the defendant, employed in purchasing cattle for him, having always money in hand, and never authorized to buy on credit. The cattle were paid for by bills drawn on M., which the plaintiff afterwards renewed.

The Court held, that it was properly left to the jury to say whether the cattle were sold upon the credit of M. or of the defendant, and that it made no difference that M. was a known agent of the defendant. The jury having found for the defendant, the Court refused to disturb the verdict.

SHORT *v.* SPACKMAN, M. T. 1831. K. B. 2 *B. & Ad.* 962.

An agent who does not name his principal is entitled to goods, though his principal refuse them.

GOODS were bought by the plaintiffs, (brokers), and the vendors informed that they were purchased not for the brokers, but for an unnamed principal. The principal afterwards renounced the contract, in which the plaintiffs acquiesced.

The Court held, that the repudiation by the principal was not a circumstance of which the vendors could take advantage, and refuse to deliver, the plaintiffs appearing upon the bought and sold notes to purchase as principals.

IX. RELATIVE TO THE AGENT'S COMMISSION.

PRYCE *v.* WILKINSON, H. T. 1825. C. P. 2 *Bing.* 470.

In procuring a loan, an agent, under 12 Anne, is only entitled to five per cent*.

PLAINTIFFS, being applied to by the defendant to sell an estate, or procure a loan upon it, and, having failed in their attempts to sell, applied to an attorney, who effected a loan.

The Court held, that, having assisted in procuring such loan, they were within the policy of the 12 Anne, st. 2, c. 16, s. 2, and not entitled, therefore, to take beyond the 5*l.* per cent commission.

* The plaintiff was employed to sell ground rents by auction, on the terms of receiving a commission of one per cent. "on sale." After he had advertised the sale, but before the day of sale, the defendant sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed, and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. The question was, whether this custom was so notorious that the defendant must have known it; and that, if so, it was engrafted in the contract. The jury found for the plaintiff for the full commission. (*Rainy* v. *Vernon*, 1840, N. P., 9 C. & P. 559).

A. acted under a written agreement, as the commission agent of B., in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances, in addition to his commission:—Held, that if, in giving these attendances, A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that, if these attendances were matter beyond his duty as an agent, he was entitled to

BOWER *v.* JONES, M. T. 1831. C. P. 8 *Bing.* 65; S. C. 6 *M. & P.* 140.

COMMISSION on all goods sold, the agent to be responsible for all bad debts, and to draw his commission monthly—

The Court held, was a commission on bad as well as on good debts, notwithstanding a custom of trade to the contrary.

Commission is payable on bad debts, if the agent is responsible for them.

HORNBY *v.* LANG, E. T. 1817. K. B. 6 *M. & Selw.* 166.

THE sale was made by a factor, the purchaser knowing him to be such, but the vendors' names were not disclosed.

The Court held, that the latter might sue for the amount, notwithstanding a factor acted upon a del credere commission, and bills had been drawn for the amount, but which had never been paid. The giving such commission is in order to obtain an additional security, and not to substitute one for another, nor to vary the rights of third parties.

An agent's having a del credere commission does not preclude his principal from suing.

X. RELATIVE TO THE DISMISSAL OF THE AGENT*.

See, also, tit. *Master and Servant.*

XI. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) WHAT ACTIONS ARE OR ARE NOT MAINTAINABLE.

METCALFE *v.* CLOUGH, E. T. 1828. K. B. 2 *M. & Ry.* 178.

A DIRECTION to an agent to enter upon premises (in mortgage), and sell the stock, &c., was declared to be for the benefit of the plaintiff, and to amount to an authority to the defendant, the agent, to pay over the amount to him.

The Court held, that the authority could not be revoked, and the plaintiff might sue the agent for money had and received.

Money had and received lies against an agent.

TAYLOR *v.* KYMER, H. T. 1832. K. B. 3 *B. & Ad.* 820.

THE defendants bought —— chests of indigo for N. & Co., agents of the plaintiff, for which the defendants paid, and retained the war-

A vendee who purchases

be paid for them separately:—Held, also, that this was a question for the jury. (*Marshall* v. *Parsons*, H. T. 1841, N. P., 9 C. & P. 656).

If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission, or even a compensation for his trouble. (*Hammond* v. *Holiday*, T. T. 1824, N. P., 1 C. & P. 384).

Where two brokers are referred to in advertisements by a shipowner, and one procures the cargo and receives the freight, and the other pays the charges for clearing out the ship, &c., the latter must share the commission, &c., with the former, and cannot, by the usage of trade, maintain an action against the shipowner. (*Hall* v. *Benson*, M. T. 1836, N. P., 7 C. & P. 711).

* If the acting manager of a theatre conducts himself in such an improper manner as to make it injurious to the interests of the theatre to keep him, the lessee or proprietor may lawfully dismiss him. (*Lacy* v. *Osbaldiston*, T. T. 1837, N. P., 8 C. & P. 80).

through an agent, and has a right to possession, may support trover against the vendor*.

rants; N. & Co. made out the invoice to the plaintiff, and were paid the amount, but neither the plaintiff nor his agents ever had possession of the indigo or warrants, nor had the defendants notice of the plaintiff's claim until after they had been authorized by N. & Co. to sell and reimburse themselves; it appearing also that the defendants had a lien against N. & Co.

The Court held, that the plaintiff could not maintain trover against the defendants for a supposed conversion by them of the indigo; but, as to the other chests which N. & Co. had bought of M. and paid for, and received the warrants, and made out the invoice to the plaintiff, and by him been paid the amount, but afterwards deposited them with the defendants in lieu of others, on which the defendants had a lien, and the defendants subsequently disposed of the whole of the former, that the plaintiff might maintain trover.

(*b*) Pleas.

PARKER *v.* WISE, E. T. 1817. K. B. 6 *M. & Selw.* 239.

Pleas, that the plaintiffs advanced beyond the sum named in the bond, and that a chose in action was assigned in the discharge of the bond, are bad.

IN debt on an indemnity bond, given to bankers to secure advances, the condition of which was, that the obligors should pay the balance already due, and such further advances as the bankers should make, "not exceeding £——;" pleas, first, that the bankers allowed the party to overdraw beyond that sum, contrary to the condition; and secondly, that the obligees, after the making of the bond, dissolved partnership, at which time a balance to the said amount was due to the partnership, but no demand made for payment, but that the obligors consented that it should be transferred to the account of the obligors with the new partnership, and had become incorporated in their account.

The Court held, first, that the restrictive words in the condition had not the effect of avoiding the bond if the obligees should advance beyond the sum stated; and, secondly, that the second plea was bad, as alleging the assignment of a chose in action to be a discharge of the obligation.

(*c*) Evidence.

COATES *v.* BAINBRIDGE, T. T. 1828. C. P. 5 *Bing. N. S.* 58; S. C. 1 *M. & P.* 142.

Agent's letters adopted are evidence against the principal†.

THE defendants' agents, at their request, received money on their account, and wrote to apprise them of their having so received it for them. The defendants, in answer, gave directions for remitting the amount to them.

The Court held, that, under these circumstances, the letters of

* A factor placed goods in the hands of a broker as security for an advance to himself, and with directions to sell. The goods were sold before any revocation of these directions. The principal cannot maintain trover against the broker. (*Stiereneld* v. *Holden*, H. T. 1825, N. P., 1 R. & M. 219).

† If certain commissioners, under a private act of Parliament, may sue and be sued by their clerk, it is not necessary at the trial of an action brought in the

the agents were admissible in evidence to charge the defendants with the receipt of the money.

GOOM *v.* AFALO, M. T. 1826. K. B. 6 *B. & C.* 117.

THE broker made an entry of the contract in his broker's book, but did not sign it, but delivered notes copied from the book and signed to each party.

The Court held, that it was a binding contract within the requisites of the Statute of Frauds, and not invalidated by any usage or custom of merchants not recognised as a part of the common law.

Though a broker's book be not signed, if copies be made from the book and signed, it is sufficient,

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GRANT *v.* FLETCHER, E. T. 1826. K. B. 5 *B. & C.* 436; S. C. 8 *D. & R.* 59.

THE broker made a note of the contract in his book, but did not sign it, and afterwards drew up the bought and sold notes, and delivered to the parties, materially different in the terms.

The Court held, that there was no valid contract.

unless they differ in terms.

(*d*) WITNESSES.

BOORMAN *v.* BROWNE, E. T. 1838. Q. B. 1 *P. & D.* 364.

IN case against a broker, employed by the plaintiff to sell seed, for delivering it without payment—

A sub-agent, liable, is not a

name of the clerk to prove that he sues by their authority. (*Truwhitt* v. *Depree*, H. T. 1827, N. P., 2 C. & P. 557).

In an action against a body corporate for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured, a letter written to the plaintiff respecting the pulling down of the house by the defendants' surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them. (*Peyton* v. *Governors of St. Thomas's Hospital*, T. T. 1828, N. P., 3 C. & P. 363).

If a person, on being applied to on a particular subject, writes an answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon:" such letters are sufficient to constitute the party referred to agent in the business, and what he said at a meeting on the subject may be given in evidence against the principal. (*Hood* v. *Reeve*, T. T. 1828, N. P., 3 C. & P. 532).

Where the agent's authority was not shewn, and it appeared that he was not acting within the scope of his ordinary employment:—Held, that the agent's declarations were inadmissible. (*Schumack* v. *Lock*, H. T. 1825, C. P., 10 Moore, 39).

Where the plaintiffs had intrusted an agent with indigo warrants, without any authority to sell or pledge, but who had parted with them to the defendants, and the plaintiffs sought to recover the proceeds:—Held, that it lay on the defendants, seeking to avail themselves of the 6 Geo. 4, c. 94, s. 2, to prove the contract with the agent from whom they had received them, and to produce the written agreement; the plaintiffs having, however, produced the agent as a witness, and he having communicated the fact of the contract being in writing, which might have induced the belief that it might not be necessary for the defendants to give that evidence, the Court granted a new trial on payment of the costs by the defendants. (*Evans* v. *Freeman*, 1831, N. P., 2 M. & M. 10; S. C. 2 B. & Ad. 886).

competent witness*.

The Court held, that the lighterman, being a sub-agent employed by the defendant in transhipping the seed, and therefore liable to the plaintiff if he did so without authority, was an incompetent witness to prove acts of the plaintiff sanctioning the delivery.

XII. RELATIVE TO LIEN CONNECTED WITH.

ROBERTSON *v.* KENSINGTON, H. T. 1830. K. B. 5 *M. & Ry.* 381.

A factor has no right to separate property so as to give himself a lien.

THE principal dealt only with the factors, who, at the desire of the principal, made a distinction as to goods by particular ships, in which the principal was jointly interested with others, but a general account was also kept.

The Court held, that the factors had no right to separate the account for the purpose of giving themselves a lien on a particular part of it; but that, as between them and their principal, they could only look to the whole account, and if upon that they appeared to be indebted to him, they had no lien, and consequently had no power to transfer by way of pledge.

JACKSON *v.* CLARKE, H. T. 1827. Ex. 1 *Y. & J.* 216.

As a factor cannot pledge, no lien exists against the owner.

A FACTOR placed in the defendants' hands goods consigned to him for sale, and drew bills upon the credit of them, but, before sale, notice of countermand from the plaintiff's consignor was given.

The Court held, that as the defendants could, at that time, only have held the goods as a pledge, they could not set up any lien on them as against the principal and owner.

Principal and Surety. See tit. *Surety*.

Printer.

See, also, tit. *Libel*.

STEPHENS *v.* ROBINSON, H. T. 1832. Ex. 2 *C. & J.* 209; S. C. 2 *Tyrw.* 280.

A false affidavit as to a printer

A PRINTER of a newspaper had made an affidavit under 38 Geo. 3, c. 78, describing himself as the sole proprietor thereof, when in fact he was not.

* Goods were sold on commission by the defendant abroad, on an action for not accounting, the defendant's agent in London is a competent witness for the plaintiff, though he has accepted a bill for the price of them which is lying dishonoured in the hands of the plaintiff. (*Martineau* v. *Woodland*, T. T. 1825, N. P., 2 C. & P. 65). So, a person is a competent witness for the plaintiff in an action for goods sold, though he is to receive a commission on the sale. (*Murley* v. *Langrick*, 1824, N. P., 1 C. & P. 216). But a declaration of a shopman as to goods being in his master's possession, the transaction not being within the ordinary business of the master, held inadmissible. (*Garth* v. *Howard*, T. T. 1832, C. P., 8 Bing. 451).

The Court held, that he could not recover against the real proprietors for printing, or for any thing that was done in furtherance of the sale of such newspaper, during the time to which such affidavit was applicable.

being sole proprietor precludes him from suing for work done*.

BAGSTER *v.* ROBINSON, M. T. 1832. N. P. 9 *Bing.* 77; S. C. 2 *M. & Scott,* 160.

THE plaintiff let out his types and presses to a party who was engaged by the proprietor of a periodical publication, and who composed and printed the work without the interference of the plaintiff.

The Court held, that the party hiring the types, &c., was, within the 38 Geo. 3, c. 78, responsible to the Stamp Office, and that the plaintiff letting the types, &c., was precluded from suing the proprietor for the work done.

A party letting his types, &c., to A., cannot sue B., who employs A.

Prison†.

REX *v.* JUSTICES OF LANCASHIRE, M. T. 1839, Q. B. 11 *Ad. & E.* 144; S. C. 3 *P. & D.* 86.

UPON a grant of quarter sessions to a borough under 5 & 6 Will. 4, c. 76, but without the grant of a gaol—

The Court held, that the town council have no power to contract with the county justices for the sending their prisoners to the county gaol; but where such a contract is made, under 5 Geo. 4, c. 85, with boroughs having gaols existing, although the former act may alter the controul of them, it does not take away the certiorari to remove the order of the county justices.

A grant of quarter sessions under 5 & 6 Will. 4 does not include sending prisoners to a county gaol.

YORKE *v.* CHAPMAN, E. T. 1840. Q. B. 11 *Ad. & E.* 813; S. C. 3 *P. & D.* 496.

IN an action of trespass and false imprisonment, proof that the act was done by the direction of the deputy marshal, but there was no evidence of the appointment of that person—

The Court held, that it was insufficient to fix the Marshal, unless he was proved to be cognizant of the acts of the deputy marshal.

To render the Marshal liable the deputy must be appointed.

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* The printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him. (*Poplett* v. *Stockdale*, M. T. 1825, N. P., 2 C. & P. 198; S. C. 1 Ry. & M. 337).

Where a printer has been employed to print a work of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number has been worked off, the printer cannot recover any thing, although a part has actually been delivered. (*Adlard* v. *Booth*, H. T. 1835, N. P., 7 C. & P. 108).

† Regulated by the 3 & 4 Vict. c. 25, and 5 Vict. sess. 2, c. 22.

‡ The defendant, desirous of being removed by a habeas corpus from the Fleet to the King's Bench prison, having paid a fee properly due from the plaintiff to the Warden, on commitment to the custody of the latter, he cannot afterwards summarily compel the plaintiff to reimburse him. (*Burt* v. *Bryant*, T. T. 1837, B. C., 5 D. P. C. 726).

Prisoner*.

See tits. *Declaration—Detainer—Pleas.*

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I. RELATIVE TO PROCEEDINGS AGAINST PRISONER.

(*a*) By detainer.

The 2 Will. 4, c. 39, regulates

By 2 Will. 4, c. 39, s. 8, it is enacted, "That when it shall be intended to detain in any such action any person being in the cus-

* As to the writ de contumace capiendo, see 3 & 4 Vict. c. 93.

Where a warrant on a charge of felony is lodged against a party in civil custody, the Warden is justified in confining him in the strong-room. (*Osborne* v. *Argle*, M. T. 1835, 4 D. P. C. 342; S. C. 2 Scott, 500).

tody of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet prison, the process of detainer shall be according to the form of the writ of detainer contained in the said schedule, and marked No. 5: and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; such process may issue from either of the said courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the Judges of the said Courts."

the mode of proceeding against prisoners by detainer*.

(*b*) By charging in execution.

SMITH *v.* SANDYS, M. T. 1835. K. B. *5 N. & M.* 59.

THE defendant being in custody in the year 1821 at the suit of some person, but not being in custody in the present action, the plaintiff in this action, having obtained judgment, took out a side-bar rule for the Marshal to acknowledge the defendant to be in his custody. This acknowledgment was made, and the committitur was entered upon the roll, but the defendant was not then brought up by habeas corpus to be charged in execution.

A defendant cannot be charged in execution on a judgment after the year, unless revived by sci. fa.†.

The Court held, where the judgment is more than a year and a day old, the plaintiff cannot charge the defendant in execution by habeas corpus without first reviving the judgment by sci. fa.

* A prisoner in the custody of the Marshal cannot be brought up to be charged with an attachment; but it should be lodged with the sheriff, to take him upon his discharge upon the former process. (*Boucher* v. *Simms*, T. T. 1835, Ex., 4 D. P. C. 173; S. C. 2 C., M. & R. 392).

A plaintiff cannot lodge a detainer against a defendant, and then, having, on the ground of a defect in the writ, treated it as a nullity, lodge a second detainer against him. (*Gadderer* v. *Sheppard*, H. T. 1836, B. C., 4 D. P. C. 577). After nine terms have elapsed it is too late to object that a party in custody for non-payment of poor-rates has been charged and detained on an attachment of privilege, without leave of the Court or a Judge. (*Goodman* v. ——, M. T. 1831, B. C., 1 D. P. C. 128). Where a prisoner is in custody of the sheriff on a criminal process, it is sufficient to lodge a detainer in civil process without any order from the Court. (*Grainger* v. *Moore*, H. T. 1837, Ex., 5 D. P. C. 456).

† By Rule H. T., 2 Will. 4, the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one. In order to charge the defendant in execution, it shall not be necessary that the proceedings be entered of record. Since the 2 & 3 Will. 4, c. 39, s. 8, it is not necessary to bring up a prisoner in the custody of the Warden to charge him with a declaration stating him to be in such custody. (*Barnett* v. *Harris*, T. T. 1833, B. C., 2 D. P. C. 186). The rule charging a defendant in execution need not be lodged at the prison on the same day, it is sufficient if lodged within a reasonable time. (*Blandy* v. *Webb*, E. T. 1832, Ex., 3 Tyrw. 235).

A party in execution, issued above a year and a day, on a judgment without a sci. fa., held entitled to take the objection, and not to have waived the right by delay. (*Mortimer* v. *Peggitt*, M. T. 1836, K. B., 4 A. & E. 363, n.). A prisoner in custody of the Marshal, under a Judge's warrant, may be brought up to be

WILLIAMS *v.* WARING, T. T. 1835. Ex. 2 *C., M. & R.* 354; S. C. 4 *D. P. C.* 200.

But, judgment signed in Michaelmas vacation—warrant delivered last day of Hilary Term—in time.

IN debt on bond in a penalty of 312*l.* judgment was signed in Michaelmas vacation; on the last day of Hilary Term a warrant to take the defendant on a ca. sa. was delivered to the deputy in London of the sheriff of Denbighshire:—Held, that the defendant was charged in execution in due time.

II. RELATIVE TO THE COMMENCEMENT OF THE IMPRISONMENT.

YAPPE *v.* HARTINGTON, T. T. 1837. C. P. 3 *Bing. N. S.* 907.

Imprisonment commences from time of being within the walls of the prison.

AN insolvent was arrested upon the 5th of November, but was not conveyed to prison until the 12th, being left during the interval in the care of a friend of the officer; and a sale of the insolvent's effects, under a fieri facias, took place between the 5th and 12th of November.

The Court held, that the arrest of the insolvent upon the 5th was not, under the circumstances, such a commencement of his imprisonment as rendered the execution void, under the 34th section of the 7 Geo. 4, c. 57, (Insolvent Debtor's Act).

III. RELATIVE TO PROCEEDINGS BY PRISONERS.

(*b*) BY LORDS' ACT.

1. *To what Cases applicable.*

ROBINS *v.* CRESWELL, M. T. 1834. K. B. 4 *N. & M.* 307; S. C. 2 *Ad. & E.* 23.

The debt and costs must not exceed 300*l.**.

ON a prisoner being brought up under the compulsory clause in the Lords' Act—

Per Cur.—The words "besides costs of suit" being omitted in 33 Geo. 3, c. 5, it is necessary, in order to bring a party within the statute, that he should be charged in execution for a debt which, including the costs, is under 300*l.*

charged with a declaration. (*Ess* v. *Smith*, E. T. 1832, Ex., 3 Tyrw. 363). Where a defendant is in a county gaol, the plaintiff is not entitled, as of right, to a writ of habeas corpus ad satisfaciendum, with a view to remove him to the custody of the Warden of the Fleet. The issuing of such a writ is discretionary with the Court. (*Williams* v. *Jones*, T. T. 1832, Ex., 2 C. & J. 611). Where one of two defendants was in custody on a criminal charge, the Court allowed him to be brought up to be charged with a declaration. (*Williams* v. *Smith*, H. T. 1833, Ex., 1 D. P. C. 703).

* Under the Lords' Act, the Court have no power to inquire whether the acceptance on which the party was in execution on a judgment obtained against him be a forgery or not. (*Rue* v. *Lee*, M. T. 1824, C. P., 9 Moore, 593).

WOMERSLEY *v.* BOUSFIELD, E. T. 1830. C. P. 6 *Bing.* 801.

A MOTION had been made to bring up a party in custody for debts not exceeding 300*l.*, under the compulsory clause of the Lords' Act; it appeared he had been subsequently charged in execution at the suit of another creditor for 500*l.*

A prisoner may be brought up under the Lords' Act, though subsequently charged in execution for a larger sum than 300*l.*

The Court held, that, notwithstanding the second execution, he was still within the operation of the statute; and, upon his declining to give in a proper schedule, remanded him for sixty days, subject to the consequences of his contumacy.

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2. *Of the Notice and Motion, and within what Time.*

BUXTON *v.* SPIRES, M. T. 1835. Ex. 2 *C., M. & R.* 601; S. C. 4 *D. P. C.* 365; S. C. 1 *T. & G.* 74.—S. P. HAYWARD *v.* PRIEST, M. T. 1833. C. P. 3 *M. & Scott*, 388.

THE twenty days' notice given by a creditor to a prisoner, of his intention to call upon him to account, expired on the first day of term—

The 20 days' notice must expire before the term*.

The Court held, that he could not be called upon until the next term.

PERROTT *v.* DEANE, M. T. 1834. Ex. 2 *C. & M.* 318; S. C. 2 *D. P. C.* 284.

A DEBTOR was brought up under the Lords' Act, and he had his sixty days allowed, but did not file his schedule, and in the mean time petitioned the Insolvent Court.

Time enlarged beyond sixty days after peti-

* The 32 Geo. 2, (the Lords' Act), c. 28, in its compulsory clause, (16th), authorizes a creditor, on giving twenty days' notice in writing to his debtor, to compel the debtor to give in, upon oath, a true account in writing of all his real and personal estate, &c., within the first seven days of the term which shall next ensue after the expiration of the said twenty days:—Held, that such seven days are to be computed from the first day of the term which shall next ensue the expiration of the said twenty days, and not from the time in which the twenty days' notice to the debtor may expire; and a motion to bring up the insolvent after the expiration of the first seven days in such term will be refused. (*Rogers* v. *Peckham*, M. T. 1834, C. P., 3 D. P. C. 142; S. C. 1 Scott, 121). An application to bring up an insolvent, under the Lords' Act, on the seventh day of the term, held too late. (*Acraman* v. *Harrison*, E. T. 1832, C. P., 8 Bing. 154; S. C. 1 M. & Scott, 240).

Service of the notice, under the compulsory clauses of the Lords' Act, by a creditor on the landlady of the house where the detaining creditor lodged, held insufficient, unless sworn that she acted as his servant. (*Wood* v. *Gompertz*, M. T. 1835, B. C., 4 D. P. C. 276; S. P. *Fogarty* v. *Smith*, H. T. 1836, B. C., 4 D. P. C. 595).

The services of the notices required to be given by a creditor who seeks to bring up a debtor under the compulsory clause in the Lords' Act, (32 Geo. 2, c. 28, s. 16), may be proved by a witness vivâ voce, and need not be proved by affidavit; secus, with respect to the notices to be given by the prisoner. (*Rolph, Ex parte*, 1834, N. P., 6 C. & P. 406). But the motion to bring a party up, under the compulsory clauses of the Lords' Act, must be supported by an affidavit that all the creditors have been served with notice. (*Grove* v. *Parker*, E. T. 1834, Ex., 2 D. P. C. 626).

tion in the Insolvent Court*.

This Court enlarged the time for filing his schedule until after the day when he was to be brought up before the Insolvent Court.

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3. *Discharge under, setting aside*†.

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4. *Power of the Judge at the Assizes.*

BRIGGS *v.* SHARPE, H. T. 1830. C. P. 6 *Bing.* 517.

The Court will not interfere with Judge's decision at assizes.

THE insolvent had been brought up under the Lords' Act before a Judge of assize, and remanded, after the Judge had examined the note of allowance and affidavit.

The Court held, that they were precluded from interfering, except upon matter arising subsequently.

REX *v.* BELK, E. T. 1826. K. B. 7 *D. & R.* 234.

Where a prisoner was remanded from one assizes to another, the Judge would not adjudicate without an order from the Court.

A PRISONER, brought up at the assizes under the compulsory clauses of the Lords' Act, not being prepared with his schedule was remanded generally; and at the ensuing assizes, more than sixty days having elapsed, the Judge considered that he had no jurisdiction to take his examination without an order from the Court. The latter, holding they had jurisdiction, made an order to the gaoler accordingly, that he might be brought up at the next assizes, and be examined; but such order to bring up at the next assizes cannot refer to a special gaol delivery.

(*c*) UNDER THE ACT FOR THE RELIEF OF DEBTORS IN EXECUTION FOR DEBTS UNDER £20.

1. *To what Cases applicable.*

DOE *d.* DAFFEY *v.* SINCLAIR, E. T. 1837. C. P. 5 *D. P. C.* 615; S. C. 3 *Bing. N. S.* 778.—S. P. DOE *d.* THRELLFOLD *v.* WARD, M. T. 1836. Ex. 5 *D. P. C.* 290; S. C. 2 *M. & W.* 65.—S. P. DOE *v.* ———, T. T. 1831. B. C. 1 *D. P. C.* 69.

The debt is the test‡.

A PARTY had been in prison for twelve months, on judgment in ejectment, for damages 1*s.*, costs 40*s.*, and increased costs above 20*l.*

* Where a prisoner, brought up under the compulsory clauses of the Lords' Act, is not prepared with her schedule, and she refuses to claim her sixty days, the Court is bound to allow them to her; (*Pierce* v. *Danson*, M. T. 1832, B. C., 1 D. P. C. 496); and the Court allowed further time to a prisoner brought up under the compulsory clause, upon his alleging that he had petitioned the insolvent Court for his discharge. (*In re Payne*, E. T. 1832, C. P., 8 Bing. 196).

† Where a defendant has been discharged under the Lords' Act for five years, it is too late, at the end of that period, to apply to set aside the order for the discharge. (*Hawkins* v. *Pring*, M. T. 1833, B. C., 2 D. P. C. 401).

‡ And being exactly 20*l.* is no objection. (*Thomson* v. *King*, H. T. 1836, B. C., 4 D. P. C. 582). A prisoner who has been in custody for twelve months for a debt or for damages not exceeding 20*l.*, is entitled to his discharge absolutely as a matter

The Court held, that the defendant was entitled to be discharged under the 48 Geo. 3, c. 123, the words of which are, "any debt or damages, *exclusive* of the costs incurred."

TINMOUTH *v.* TAYLOR, M. T. 1829. K. B. 10 *B. & C.* 114.

THE plaintiff was in execution for the costs of judgment of nonsuit, amounting to 34*l.* Having been in execution for more than a year, he had obtained a rule under the 48 Geo. 3, c. 123, calling upon the defendant to shew cause why he should not be discharged out of custody.

Costs after judgment become a debt, and not within the 48 Geo. 3, c. 123.

Per Cur.—The object of the act, if taken from the preamble, would appear to apply to defendants only; but if, in order to bring a case like this within the act, it be said that the costs become a debt by the judgment, they must be under 20*l.*; otherwise, it is impossible to say that the case comes fully within the act.

WINTER *v.* ELLIOTT, E. T. 1834. K. B. 3 *N. & M.* 315; S. C. 1 *Ad. & E.* 24.

A PARTY charged in execution for damages recovered in an action for an assault—

The word "damages," in the 48 Geo. 3, applies to assaults.

The Court held, that he was within the provision of the act of 48 Geo. 3, c. 123, "for the discharge of debtors in execution for small debts from imprisonment in certain cases."

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2. *Of the Imprisonment*.*

3. *Of the Petition†.*

of right. (*Stacy* v. *Fieldsend*, H. T. 1833, Ex., 1 D. P. C. 700). So, the Court will discharge a debtor who has lain in prison for the space of twelve successive calendar months for a debt not exceeding 20*l.*, under the 48 Geo. 3, c. 123, s. 1, although he has been brought up under the compulsory clauses of the Lords' Act, and has refused to deliver in his schedule. (*White, Ex parte*, T. T. 1831, B. C., 1 D. P. C. 66). So, where the judgment in debt was for 100*l.*, but the real debt for which he was taken in execution was under 20*l.*:—Held, that he was entitled to be discharged after twelve months lying in prison. (*Harris* v. *Parker*, T. T. 1835, Ex., 3 D. P. C. 451). The 48 Geo. 3, c. 123, applies to the case of a prisoner in execution for damages not exceeding 20*l.*, recovered against him in an action for crim. con. (*Goodfellow* v. *Hollings*, T. T. 1836, C. P., 4 D. P. C. 198; S. C. 3 Bing. N. S. 1). But where the amount for which the party was charged in execution exceeded 20*l.*, although the original debt was less, but the excess was made up of interest:—Held, that he was not entitled to be discharged under the 48 Geo. 3, c. 123. (*Cooper* v. *Bliss*, H. T. 1834, C. P., 3 M. & Scott, 791).

* To entitle a prisoner to his discharge under the 48 Geo. 3, c. 123, s. 1, he must have actually been confined within the walls, and not merely within the rules, for twelve months. (*Sumptean* v. *Monsani*, H. T. 1837, K. B., 4 Ad. & E. 1007.—S. P. *Barnard* v. *Symonds*, E. T. 1837, B. C., 5 D. P. C. 520.—S. P. *Gilbert* v. *Pope*, H. T. 1837, Ex., 5 D. P. C. 449; S. C. 2 M. & W. 311).

† The Court will not interfere, under the 32 Geo. 2, c. 28, s. 11, to relieve a debtor from alleged extortion, unless a primâ facie case of extortion is made out on the part of the petitioner. (*Tighe, Ex parte*, E. T. 1833, B. C., 2 D. P. C. 148).

4. *Of the Notice*.*

5. *Of the Motion, Rule for, and within what Time, and of the Discharge.*

PORKERS *v.* WILKINS, M. T. 1838. C. P. 7 *D. P. C.* 152.—S. P. ANON., M. T. 1831. B. C. 1 *D. P. C.* 150.

The rule may be moved the day before the year expires†.

ON motion to discharge the prisoner out of custody, it appeared that the defendant having been taken on the 27th November, 1837, the Court, on the 26th November, 1838, granted a rule for his discharge under the provisions of the 48 Geo. 3, c. 123, ten days' notice of the motion having been given.

* Where a prisoner applies for his discharge under the 48 Geo. 3, c. 123, his notice must be served on the plaintiff, and therefore service on his attorney is not sufficient. (*Kelly* v. *Dickinson*, H. T. 1833, B. C., 1 D. P. C. 546.—S. P. *Johnson* v. *Rutledge*, E. T. 1837, B. C., 5 D. P. C. 579). And as the notice under the 48 Geo. 3, c. 123, s. 1, must be served on the plaintiff himself personally, the latter does not waive the objection, that it has been so served, by appearing on the notice. (*Biddulph* v. *Gray*, H. T. 1836, B. C., 5 D. P. C. 406). In order to obtain a discharge under the 48 Geo. 3, c. 123, it is not sufficient that the notice should be left "with a female, at the plaintiff's residence." (*George* v. *Fry*, M. T. 1805, B. C., 4 D. P. C. 273). But where a plaintiff's residence cannot be found, the defendant, who applies for relief under 48 Geo. 3, c. 123, may serve the notice required by that statute on the plaintiff's attorney. (*Wilson* v. *Mockler*, H. T. 1833, B. C., 1 D. P. C. 549). So, where a plaintiff in execution for the costs of a nonsuit applied for his discharge under 48 Geo. 3, c. 123, the Court held service on the defendant's attorney sufficient, it being sworn that the action had been commenced at the instance of the plaintiff's wife, without his authority, and that the residence of the defendant could not be discovered. (*Bradley* v. *Webb*, E. T. 1839, B. C., 7 D. P. C. 588).

On applying to discharge a prisoner under the 48 Geo. 3, c. 123, the name of the cause stated in the notice must correspond with the name of that in which he is in execution; (*Kelly* v. *Dickinson*, H. T. 1833, B. C., 1 D. P. C. 537). And where a defendant seeks to obtain his discharge under the 48 Geo. 3, c. 123, the plaintiff being dead, he must serve the notice on the personal representative of the deceased, or shew that there was no personal representative, before a notice to the attorney of the plaintiff will be considered sufficient. (*Ex parte Richer*, M. T. 1835, B. C., 4 D. P. C. 275). So, where the party had become of unsound mind:—Held, that an application by his wife might, for the purposes of the act, be treated as that of the husband. (*Clay* v. *Baxter*, E. T. 1837, K. B., 5 Ad. & E. 400).

The retainer of the attorney terminating with the judgment, notice under the 48 Geo. 3, c. 123, served upon him, is not sufficient. (*Gordon* v. *Twine*, H. T. 1836, B. C., 4 D. P. C. 560).

† By Reg. H. T. 2 Will. 4, a rule or order for the discharge of a debtor, who has been detained in execution a year for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

The application should be made to the Court in term time, and cannot be disposed of at chambers. (*Kelly* v. *Dickinson*, H. T. 1833, B. C., 1 D. P. C. 546.—S. P. *Jones* v. *Fitzaddams*, T. T. 1833, Ex., 1 C. & M. 855; S. C. 2 D. P. C. 111; S. C. 3 Tyrw. 111). Notice ought to be given of the motion; otherwise only a rule nisi will be granted in the first instance. (*Jones* v. *Fitzaddams*, T. T. 1833, Ex., 1 C. & M. 855; S. C. 2 D. P. C. 111; S. C. 3 Tyrw. 111.—S. P. *Moore* v. *Clay*, T. T. 1835, B. C., 4 D. P. C. 5). Service of rule on one of two plaintiffs, who undertakes to accept on behalf of both, is sufficient to entitle a defendant to his discharge under the 48 Geo. 3, c. 123. (*Faulkner* v. *Haslar*, M. T. 1840, 9 D. P. C. 138). Rule absolute granted in the first instance for the discharge under the Small Debtors' Act, of a defendant in ejectment, where notice of the application had been given to only one of two lessors of the plaintiff, the other having no interest, and it not being known where he was to be

(*d*) Of the prisoner's allowance.

CORMACK *v.* BAIN, H. T. 1827. C. P. 4 *Bing.* 230.

THE attorney refused to disclose the plaintiff's residence, to enable the insolvent to serve him with notice of his intention to come up to be discharged—

The Court refused to allow the attorney to give the undertaking for his sixpences, and the party was discharged.

Where an attorney refused to give the plaintiff's residence, the prisoner was discharged*.

GAINSFORD *v.* MARSHALL, M. T. 1829. K. B. 10 *B. & C.* 224.

ON the question, whether the turnkey to whom the creditor is to pay the sixpences is to be considered the agent of the debtor, and whether it is his duty to receive good money—

The Court held, that he was the agent of the debtor, and therefore his act bound the debtor.

The turnkey, who receives the allowance (the sixpences) is the agent of the debtor.

(*e*) Of the rules and day rules†.

IV. RELATIVE TO THE SUPERSEDEAS‡.

found. (*Doe* d. *Smith* v. *Payton*, T. T. 1839, B. C., 7 D. P. C. 671). And, where the party has remained in execution twelve months for a debt not exceeding 20*l.*, held not to be precluded from his discharge, under the 48 Geo. 3, c. 123, although he has been brought up under the Lords' Act, and claimed his sixty days, which have not expired. (*Venner* v. *Oxenham*, 1838, B. C., 6 D. P. C. 766).

In an application, under the 48 Geo. 3, c. 123, s. 1, for the discharge of a prisoner out of custody, who has lain in prison twelve months in execution for a debt not exceeding 20*l.*, the Court will not inquire into other circumstances, but require only to be satisfied of those facts. (*Baxter* v. *Clarke*, M. T. 1835, Ex., 2 C., M. & R. 734; S. C. 1 T. & G. 133).

Where a defendant is in custody in any other prison than the Fleet, he cannot be discharged in the Exchequer under the Small Debtors' Act, unless a copy of the causes, in which the defendant is in custody, has been procured and verified by the proper officer. (*Short* v. *Williams*, M. T. 1835, Ex., 4 D. P. C. 357; S. C. 1 T. & G. 236).

A prisoner, for a debt under 20*l.*, having been in execution twelve months:—Held, entitled to be discharged out of custody as to such execution, although sworn of ability to pay, and that there were several detainers against him. It seems that the imprisonment, which is to entitle a defendant to his discharge under the 48 Geo. 3, c. 123, must be immediately previous to the application. (*Stubbing* v. *M'Grath*, M. T. 1838, B. C., 7 D. P. C. 328).

* The note for the sixpences, signed by the attorney only, is insufficient. (*Eagle* v. *Brown*, T. T. 1827, C. P., 12 Moore, 161).

† Before stat. 5 Vict. c. 22, the defendant having been out of custody on a day rule would not be deprived of his right to be discharged; aliter, if out of custody without such rule. (*Boughey* v. *Webb*, M. T. 1835, B. C., 4 D. P. C. 320).

By the 5 Vict. sess. 2, c. 22, s. 12, the rules and day rules are abolished. And even before that statute, the Marshal could not, of his own authority, grant the rules to a prisoner in custody for a contempt, which is for punishment, but must have made a special application to the Court for that purpose. (*Gompertz, In re*, H. T. 1837, K. B., 1 N. & P. 618).

‡ By Reg. Gen., H. T. 2 Will. 4, the Marshal of the King's Bench Prison and the Warden of the Fleet shall present to the judges of the Courts of King's

V. RELATIVE TO THE DISCHARGE.

FOTHERGILL *v.* WALTON, T. T. 1827. C. P. 4 *Bing.* 711.

Where a creditor dies his administrator is

THE plaintiff, after charging the defendant in execution, became bankrupt, and died, and the assignees had renounced all interest in the action—

Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, shewing as to what actions, and on what account, they are so, and as to what actions (if any) they still remain not supersedeable.

By the same rule, if, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the Marshal of the King's Bench Prison or Warden of the Fleet be not entitled to a supersedeas or discharge to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the Marshal or Warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the Marshal or Warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable.

By the same rule, all prisoners who have been or shall be in the custody of the Marshal or Warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet Prison as to all such actions which they have been or shall be supersedeable.

By the same rule, the order of a Judge for the discharge of a prisoner, on the ground of a plaintiff's neglect to declare or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in country causes, unless cause be shewn within four days, within such further time as the Judge shall direct.

By the same rule, a rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l.* may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Where a defendant has surrendered in discharge of bail after trial, and the plaintiff has not charged him in execution within two terms after the trial, the defendant may be superseded, and cannot afterwards be taken on a ca. sa. issued on a judgment afterwards signed. (*Brown* v. *Gardner*, T. T. 1832, B. C., 1 D. P. C. 426).

Under Rule H. T., 2 Will. 4, a prisoner once supersedeable is always so. (*Hewitt* v. *Melton*, E. T. 1833, Ex., 1 C. & M. 579; S. C. 2 D. P. C. 71; S. C. 3 Tyrw. 503; abr. ante, tit. *Attorney*).

If a prisoner is supersedeable in consequence of the plaintiff not charging him in execution in due time, pursuant to 1 Reg. Gen. H. T., 2 Will. 4, s. 85, the lapse of time is no answer to an application for his discharge. As against prisoners, 3 Reg. Gen. H. T., 4 Will. 4, abolishes the doctrine of relation, so as to prevent them from reckoning the term previous to a vacation in which final judgment is signed as one of those within which a plaintiff must charge in execution, so as to prevent the defendant from become supersedeable. (*Colborn* v. *Wall*, E. T. 1837, B. C., 5 D. P. C. 534; S. P. *Wyatt* v. *Howell*, E. T. 1837, Ex., 5 D. P. C. 585). If a plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with 1 Reg. Gen. H. T., 2 Will. 4, s. 35, and the defendant is not supersedeable. (*Myers* v. *Cooper*, M. T. 1833, B. C., 2 D. P. C. 423). The Rule Hil. T., 2 Will. 4, as to the discharge of prisoners supersedeable, held to apply only to prisoners within the walls, and not within the rules of the respective prisons only. (*Seggers* v. *Brett*, M. T. 1833, K. B., 5 B. & Ad. 455).

The Marshall or Warden is not bound under Reg. Gen. H. T., 2 Will. 4, s. 88,

The Court refused to discharge him without the consent of the administratrix. — the party to consent to prisoner's discharge*.

VI. RELATIVE TO CRIMINAL CUSTODY. See, also, tits. *Constable—Indictment.*

REX *v.* JUSTICES OF MIDDLESEX, H. T. 1834. K. B. 3 *N. & M.* 110.

A PARTY who is convicted before a court of quarter sessions illegally holden, is entitled to have the benefit (if any) of a record of the proceedings at those sessions; and— A prisoner is entitled to have a record of the proceedings with the view of pleading†.

The Court will grant a mandamus to the justices to make up such a record of those proceedings, as they shall think fit.

Privilege. See tits. *Ambassador—Arrest—Attorney.*

Privy Council.

See tit. *Mandamus.*

SMYTH, *Ex parte,* M. T. 1835. Ex. 2 *C., M. & R.* 748; S. C. 1 *T. & G.* 222.

THE Judicial Committee of the Privy Council had jurisdiction, and the matter complained of was mere matter of practice— No prohibition, unless the ju-

to discharge a prisoner who is supersedeable, without an order of the Court or a Judge. (*Robinson* v. *Creswell*, E. T. 1837, Ex., 5 D. P. C. 601; S. C. 2 M. & W. 410).

* The 41st section of the 1 & 2 Vict. c. 110, has not taken away a prisoner's right to his discharge under the 48 Geo. 3, c. 123. (*Chew* v. *Lye*, T. T. 1839, Ex., 7 D. P. C. 465).

A prisoner is entitled to his discharge under the 48 Geo. 3, c. 123, although he refuses to deliver his schedule, pursuant to the compulsory clauses of the Lords' Act, after the expiration of sixty days, claimed by him, and which have expired before the end of the twelve months' imprisonment, in respect of which he claims his discharge. (*Davis* v. *Curtis*, M. T. 1836, C. P., 5 D. P. C. 344; S. C. 3 Bing. N. S. 259; S. C. 3 Scott, 321). On notice of moving to discharge a party out of custody under 48 Geo. 3, c. 123, it is not necessary to leave also a copy of the affidavit on which the application is made. (*Wilcox* v. *Lemon*, M. T. 1839, B. C., 8 D. P. C. 144).

† A constable who apprehends a prisoner has no right to take away from him any money which he has about him, unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence; (*Rex* v. *O'Donnell*, 1835, C. C. C., 7 C. & P. 138); and the Court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried; (*Rex* v. *Barnett*, 1829, N. P., 3 C. & P. 600); though, where a prisoner who was indicted for uttering two forged promissory notes, one for 29*l.*, and another for 26*l.*, when called on to plead applied to the Judge to order twenty-eight sovereigns, found on him when he was apprehended, to be restored to him, and there was ground for supposing that 26*l.* of the sum found was the proceeds of the alleged forged note for that amount, the Judge therefore ordered that 2*l.* only should be given back to the prisoner. (*Rex* v. *Burgiss*, 1836, N. P., 7 C. & P. 488).

Where error is brought on a conviction of felony, and, after a four-day rule has been obtained and served on the Attorney-General and prosecutor, there is no

dicial committee exceed their jurisdiction.

The Court of Exchequer held, that they had no jurisdiction to interfere by prohibition, although they might in cases where the Judicial Committee have exceeded their jurisdiction.

Probate.

See tits. *Executors and Administrators—Legacy Duty—Stamp.*

ATTORNEY-GENERAL *v.* STAFF, M. T. 1833. Ex. 2 *C. & M.* 124; S. C. 4 *Tyrw.* 11.

Probate duty attaches on a power of appointment.

BEQUEST to trustees of stock, subject to a general power of appointment in J. S., who exercised the power in favour of herself absolutely, by appointing to herself and another, subject to a new power of appointment created by herself, and which she executed by her will.

The Court held, that having an absolute controul over it, being liable to her debts, and it having become personal property, the probate duty attached.

Procedendo.

CLARK *v.* DENTON, T. T. 1830. K. B. 1 *B. & Ad.* 92.

The Court will not assume that the inferior court will exceed its jurisdiction*.

UPON a return to a habeas corpus cum causâ, the proceedings in the inferior court shewed matter against the defendant, part of which was within, and part not within its jurisdiction.

The Court above said they would not, on that account alone, refuse a procedendo; but the best course would be to leave the defendant to his remedy by writ of error, in case the inferior court should proceed to judgment upon the matter which was not within their jurisdiction, but that they would not assume.

GODBY *v.* MANDERS, H. T. 1830. C. P. 6 *Bing.* 433.

And no prohibition lies merely after interlocutory judgment only.

ON motion for a procedendo—

The Court held, that after the interlocutory judgment in the inferior court, but before inquiry, the superior would not grant a procedendo.

joinder in error, the party convicted is entitled to be discharged out of custody. (*Rex* v. *Howse*, E. T. 1834, K. B., 3 N. & M. 462).

A. was to be tried for felony at the assizes for the county of W., and B., a material witness for A., was committed to the W. city prison for further examination on a charge of felony:—Held, that, before the trial of A., the governor of the W. city prison ought to allow A.'s attorney to see B. in his presence. (*Rex* v. *Simonds*, 1835, N. P., 7 C. & P. 176).

* Where it appears, by the declaration in a cause instituted in an inferior jurisdiction, that the sum claimed by the plaintiff is exactly 200*l.*, it is not necessary to enter into the recognizances required by the 19 Geo. 3, c. 70, s. 6, and the 7 & 8 Geo. 4, c. 71, s. 6, in order to remove it into a superior Court. (*Brady* v. *Veeres*, H. T. 1836, B. C., 5 D. P. C. 416).

HAYWARD *v.* WRIGHT, T. T. 1828. K. B. 8 *B. & C.* 386.

After a cause sent back, the Court will not quash the writ because the cause is of importance.

AFTER a procedendo had been granted to the Palace Court, the defendant applied for and obtained a rule to shew cause why the procedendo should not be set aside on the ground of the importance of the question to be tried, and of its not being a fit cause to be tried in an inferior court. Of this there was an affidavit.

Per Cur.—We are now asked to go out of the regular course on account of the supposed importance of the cause. We do not like the making of such a precedent; by doing so we have no doubt we should be opening a door to a number of applications of a similar nature.—Rule refused.

Process.

I. RELATIVE TO MESNE PROCESS.

(*a*) IN GENERAL.

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17. *Setting aside*, p. 271.

(*d*) Of the continuance of process, p. 272.

(*e*) Of writs of monition, p. 272.

(*f*) Of the amendment of. See ante, tit. *Amendment.*

(*g*) Of distringas. See ante, tit. *Distringas.*

II. RELATIVE TO FINAL PROCESS.

(*a*) Ca. sa. See ante, tit. *Execution.*

(*b*) Elegit. See ante, tit. *Execution.*

(*c*) Fi. fa. See ante, tit. *Execution.*

(*d*) Levari facias. See ante, tit. *Execution.*

I. RELATIVE TO MESNE PROCESS.

(*a*) In general.

1. *Of the Uniformity of Process Act.*

Storr *v.* Bowles, M. T. 1832. K. B. 1 *D. P. C.* 516; S. C. 4 *B. & Ad.* 112.

The Uniformity of Process Act

In Easter Term, 1832, the plaintiff had sued out a bill of Middlesex against the defendant, and the process was continued by alias

and pluries down to Mich. Term, 1832; but upon taking the pluries bill of Middlesex to the office to be signed by the proper officer, he refused to sign, thinking that, since the stat. 2 Will. 4, c. 39, no such process was issuable. is not retrospective.

Per Cur.—The statute 2 Will. 4, c. 39, applies only to actions commenced after that act came into operation.

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2. *Of the Commencement of the Action*.*

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3. *By whom issued.*

CONSTABLE *v.* JOHNSTONE, M. T. 1832. Ex. 1 *C. & M.* 88; S. C. 1 *D. P. C.* 598; S. C. 3 *Tyrw.* 231.

THE attorney, whose name was indorsed on the process, being an attorney of another Court, although not of that from which it issued— When the process is issued by an attorney, it should be by an attorney of the Court.

The Court held so far a compliance with Reg. Mich., 1 Will. 4, as not to be a ground for staying the proceedings altogether, but only until another could be substituted.

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4. *When Initials may be used, and of Misnomer†.*

HICKS *v.* MARRECO, M. T. 1832. Ex. 1 *C. & M.* 84; S. C. 3 *Tyrw.* 216.

THE defendant, a foreign merchant, was arrested for several thousand pounds by the initials of his Christian name— After diligent inquiry initials sufficient.

The Court held, that due diligence was used to ascertain his

* By 1 & 2 Vict. c. 110, s. 2, all personal actions in her Majesty's superior Courts of law at Westminster shall be commenced by writ of summons. The writ of summons is now the commencement of the action for all purposes. (*Thompson* v. *Dicas*, T. T. 1833, Ex., 2 D. P. C. 93; S. C. 3 Tyrw. 873. See *Turner* v. *Daniell*, MS., E. T. 1839, Ex., Jervis's Rules, 221, n., 4th edit.)

† By Reg. Gen. H. T., 2 Will. 4, when the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

By 3 & 4 Will. 4, c. 42, it is enacted, "That in all actions upon bills of exchange or promissory notes, or other written instrument, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient, in every affidavit to hold to bail, and in the process and declaration, to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full."

Even formerly, in cases of non-bailable process, the Court would not interfere in a summary way to set aside proceedings on the ground of misnomer in the writ, but left the party to his plea in abatement. (*Sarjant* v. *Gordon*, T. T., 1826, K. B., 6 D. & R. 258). But in another case, before the new rules and stat. 3 & 4 Will. 4, c. 42, where the Christian name of the defendant was omitted in the latitat, the Court would (if the process be bailable); set aside the proceedings on motion; but if it were serviceable only, they would not interfere on motion, but leave the defendant to plead in abatement. (*Rolph* v. *Peckham*, H. T. 1827, K. B., 6 B. & C. 164).

And since the new rules, if the initials only be used in the writ and declaration, the application should be to amend the declaration. (*Rush* v. *Kennedy*, H. T. 1839, Ex., 7 D. P. C. 199; S. C. 4 M. & W. 586).

Christian name, pursuant to Rule 32, Hilary Term, 2 Will. 4, though no inquiry had been made of the defendant or his immediate friends, or at his house or place of business; it appearing, from the affidavits, that there was reason to fear that he might quit the country if he were informed that the plaintiff was about to commence proceedings.

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5. *Of the Holidays**. See also, ante, tit. *Holidays.*

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6. *Against several Defendants.* See also, ante, tit. *Declaration.*

PEPPER *v.* WHALLEY, H. T. 1834. C. P. 1 *Bing. N. S.* 71.

Separate proceedings bad on a joint writ†.

SEPARATE proceedings taken against two included in the same writ of summons—

The Court held irregular, although two writs issued, and separate appearances entered.

(*b*) OF THE WRIT OF SUMMONS.

1. *Of the County‡, and Direction of the Writ§.*

* Before the Uniformity of Process Act, on a new trial, process might have been *made* returnable on a day between the Thursday before and the Wednesday after Easter day, when those days fell within Easter Term. (*Hall* v. *Welchman*, E. T. 1832, Ex., 1 D. P. C. 566; S. C. 2 C. & J. 472; S. P. *Lilly* v. *Gompertz*, E. T. 1832, B. C., 1 D. P. C. 376).

† 2 Will. 4, c. 39, s. 4, provides, "that it shall be lawful for the plaintiff, or his attorney, to order the sheriff or other officer or person to whom such writ shall be directed to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or other officer or person, and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other."

By Rule M. T. 3 Will. 4, it is ordered, "that every writ of summons, capias, and detainer shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one."

Before the new statute, see Reg. Gen., H. T. 1827, K. B., 6 B. & C. 639.

It is not irregular to issue two writs, either of summons or capias, against several defendants for the same cause of action, provided the writs be issued upon one præcipe, and bear date the same day. (*Angus* v. *Coppard*, M. T. 1837, Ex., 6 D. P. C. 137; S. C. 3 M. & W. 57).

Where there are several defendants, the term "you" in the notice in the summons applies distributively. (*Engleheart* v. *Eyre*, E. T. 1833, B. C., 2 D. P. C. 145).

‡ A writ of summons being directed to the defendant as of "Newcastle-upon-Tyne, in the county of Northumberland," it appearing that Newcastle-upon-Tyne was a town and county of itself, but that, by the terms of the stat. 2 & 3 Will. 4, c. 62, s. 35, the town was made to consist of certain places within the county of Northumberland:—Held, that the writ was not void upon the face of it. (*Rippon* v. *Dawson*, H. T. 1839, C. P., 7 D. P. C. 247; S. C. 5 Bing. N. S. 206).

§ A writ was directed to the chamberlain of the county palatine of Chester:—Held, that service was irregular without the intermediate step of procuring his mandate to the sheriff. (*Earl of Shrewsbury* v. *Haycraft*, M. T. 1829, C. P., 6 Bing.

2. *Reign of the King or Queen*.*

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3. *Form of Action.*

EDWARDS *v.* DIGNAM, M. T. 1833. Ex. 2 *C. & M.* 346; S. C. 2 *D. P. C.* 240.—S. P. THOMPSON *v.* DICAS, T. T. 1833. Ex. 2 *D. P. C.* 93; S. C. 3 *Tyrw.* 873.

THE writ was in "trespass," but indorsed for a debt, and the declaration was in an action of "trespass" on the case on promises—

The Court set aside the declaration and writ for irregularity, although no objection had been taken to the writ until the declaration had been filed.

The writ must accurately describe the form of action†.

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4. *Statement of the Appearance‡.*

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5. *Description of the Defendant.*

BODFIELD *v.* PADMORE, H. T. 1834. K. B. 5 *B. & Ad.* 1095.

ON motion to set aside process—

The Court held, 1st, that the Rule of H. T. 2 & 3 Geo. 4, requiring the addition and place of abode of the defendant is in effect repealed by 2 & 3 Will. 4, c. 39; and that the want of such indorsement on writs issued under the statute is immaterial; but, 2ndly, that the description of the defendant in the body of the writ, as "G. P., of the city of London," was sufficient.

The 2 & 3 Will. 4, c. 39, in effect repeals the Rule 2 & 3 Geo. 4§.

194). Upon process issuing into a county palatine:—Held, that service of the copy either of the latitat or mandate was sufficient. (*Ashbrook* v. *Townley*, T. T. 1831, K. B., 2 B. & Ad. 416). And service of process, issued by a corporation, directed to the coroner, was refused to be set aside on the ground of his being one of the burgesses; and it was objected, that it should have been directed to elisors. (*Mayor of Berwick* v. *Williams*, E. T. 1825, C. P., 10 Moore, 266).

* Where a copy of a writ of summons commenced "William the Fourth," instead of "Victoria," the Court set aside the service. (*Drury* v. *Davenport*, M. T. 1837, Ex., 6 D. P. C. 162; S. C. 3 M. & W. 45).

† Where the copy of a writ of summons described the cause of action as "an action on the case on promises," the Court set it aside for irregularity. (*Youlton* v. *Hall*, H. T. 1839, Ex., 7 D. P. C. 186; S. C. 4 M. & W. 582).

"Libel" is a sufficient description of the form of action in a writ of summons. (*Pell* v. *Jackson*, H. T. 1834, C. P., 2 D. P. C. 445). So, an action of slander is sufficient. (*Davies* v. *Parker*, T. T. 1834, B. C., 2 D. P. C. 537).

‡ In a summons, if the name of the plaintiff is omitted as the person who will enter an appearance for the defendant, if he omit to enter one, it is an irregularity. (*Smith* v. *Crump*, H. T. 1833, B. C., 1 D. P. C. 519). The Court refused to set aside a writ of summons, which required to appear in the "Court of Exchequer," omitting "of Pleas." (*Salmond* v. *Rollin*, M. T. 1839, Ex., 7 D. P. C. 852). Before the University of Process Act, see *Price* v. *Davis*, M. T. 1826, Ex., 1 Y. & J. 9; *Hamer* v. *Lane*, H. T. 1827, C. P., 12 Moore, 522; *Steel* v. *Campbell*, 1 Taunt. 424; *Humphries* v. *Collingwood*, 2 B. & Ald. 642).

§ The Uniformity of Process Act requires that the place and county of the defendant's actual or supposed residence shall be correctly stated; but the Court will

6. *Signing and Sealing.*

BURT *v.* JACKSON, T. T. 1833. C. P. 3 *M. & Scott*, 552.

A summons, stamped and sealed, is sufficient.

ON motion to set aside a writ of summons—

The Court said, it is not necessary that the filacer of the county in which the writ of summons is to be served should sign it, which may be considered his private mark and for his own convenience; it is sufficient if it be duly stamped and sealed.

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7. *Date and Teste of*.*

8. *Name of Chief Clerk†.*

9. *Statement of "Plaintiff" instead of Name‡.*

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10. *Description of the Plaintiff's Attorney.*

HENNAH *v.* WHYMAN, E. T. 1835. Ex. 2 *C., M. & R.* 239.

A. B., attorney for the "plaintiff," is good§.

ON motion to set aside process—The copy of the writ served was indorsed, "This writ was issued by &c., attorney for the said plaintiffs;" whereas in the form given in the schedule to the Uniformity

not set aside the writ of summons, unless the defendant produces a positive affidavit that the residence has been misdescribed. (*Lewis* v. *Newton*, M. T. 1835, Ex., 4 D. P. C. 355; S. C. 2 C., M. & R. 732; S. C. 1 T. & G. 72). "Yorkshire" is a good description of a defendant's residence, although he resides at the town of Kingston-upon-Hull, if he may be supposed to be resident in the former county. (*Jelks* v. *Fry*, M. T. 1834, B. C., 3 D. P. C. 37). So, a defendant (an attorney) described in a writ of summons as of "Paper Buildings, Temple:"—Held sufficient. (*Morris* v. *Smith*, E. T. 1835, Ex., 3 D. P. C. 698; S. C. 2 C., M. & R. 120).

* By 2 Will. 4, c. 39, s. 12, every summons issued under that statute shall bear date on the day on which the same shall be issued. A writ of summons, dated on a Sunday, is a nullity, and the objection is not waived by lapse of time; (*Hanson* v. *Shackelton*, T. T. 1835, B. C., 4 D. P. C. 48); but a mistake in the year in the teste of the copy of a writ of summons, the writ itself being right, is a mere irregularity, which is waived if the defendant does not come to the Court before the time for entering an appearance has elapsed. (*Edwards* v. *Collins*, M. T. 1836, B. C., 5 D. P. C. 227). A summons bearing date the day of the month is good, though the year is improperly described, or altogether omitted. (*Solomon* v. *Nainby*, T. T. 1839, Ex., 7 D. P. C. 459). If a defective writ is re-sealed, it ought to be dated of the day of re-sealing. (*Knight* v. *Warren*, T. T. 1839, B. C., 7 D. P. C. 663).

† Formerly the omission of the name of the chief clerk of the King's Bench on a writ of summons was not an irregularity: (*Wilson* v. *Joy*, T. T. 1833, K. B., 2 D. P. C. 182): and now by the 2 Will. 4, c. 39, s. 12, every writ shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then the name of the senior puisne Judge of the said Court.

‡ A copy of a writ was refused to be set aside on the ground of the word "plaintiff" being used in the indorsement instead of his name; amendments of the indorsements are constantly allowed. (*Hannah* v. *Wyman*, E. T. 1835, Ex., 3 D. P. C. 673).

§ By 2 Will. 4, c. 39, s. 12, it is enacted, "That every writ shall be indorsed with the name and place of abode of the attorney actually suing out the same; and in case such attorney should not be an attorney of the Court in which the

of Process Act it is, "This writ was issued by &c., attorney for the said A. B."

Per Cur.—The act says nothing about the indorsement, and the form of the indorsement given in the schedule is nothing but an example; the act does not say that the indorsement shall be in a precise form, and this indorsement gives all the information which the act requires.

SHEPHARD *v.* SHUM, T. T. 1832. Ex. 2 *C. & J.* 632; S. C. 2 *Tyrw.* 742.

THE process was indorsed only with the name of the agent, and not of the attorney immediately employed. But agent's name will not do.

The Court held this irregular, and set aside the process.

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11. *Indorsement of Debt and Costs*.*

PERRY *v.* PATCHETT, T. T. 1834. Ex. 1 *C., M. & R.* 87.

ON a rule to shew cause why the writ of summons should not be set aside for irregularity, on the ground that the amount of the debt and costs claimed by the plaintiff had not been indorsed on Damages need not be indorsed†.

same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be."

Where the indorsement of the attorney's name on the copy of the writ of summons omitted the words, "who resides at," before the place of abode—Held sufficient. (*Coppice* v. *Hunter*, E. T. 1840, B. C., 8 D. P. C. 504). So, "No. 10, Gray's Inn Square, Holborn," is sufficient; (*Youlton* v. *Hall*, H. T. 1839, Ex., 7 D. P. C. 175; S. C. 2 M. & M. 582); and even "Gray's Inn," held sufficient. (*Engleheart* v. *Eyre*, E. T. 1833, B. C., 2 D. P. C. 145). So, "No. 1, Clifford's Inn Passage, Fleet Street, London," held a good description of the residence of the party by whom a writ is issued, within the 2 Will. 4, c. 39, s. 12, without naming any parish. (*Arden* v. *Jones*, T. T. 1835, C. P., 4 D. P. C. 120; S. C. 2 Scott, 186). So, it is sufficient to describe an attorney plaintiff, in the indorsement on a writ of summons, as "of" a particular place, without stating him to reside there. (*Yardley* v. *Jones*, T. T. 1835, B. C., 4 D. P. C. 45). So, a writ, indorsed "M. & Co., agents for S.," without specifying the Christian names, held sufficient. (*Pickman* v. *Collis*, H. T. 1835, Ex., 3 D. P. C. 429). But indorsement of the attorney's residence, "Southampton Buildings," held insufficient; but, after the lapse of two months, the objection too late. (*Rust* v. *Chine*, E T. 1835, B. C., 3 D. P. C. 565). So, "Great James Street, Bedford Row," is insufficient. (*Lloyd* v. *Jones*, T. T. 1836, Ex., 5 D. P. C. 161).

A writ, indorsed with the name of the firm of the attorney, used in carrying on the business, satisfies the 12th sect. of the 2 Will. 4, c. 39, though only one of them is alive, and an attorney. (*Hartley* v. *Rodenhurst*, H. T. 1836, Ex., 4 D. P. C. 748).

* By Reg. Gen., H. T. 2 Will. 4, and 2 Will. 4, c. 39, s. 12, the plaintiff must indorse that he claims £—— for debt, and £—— for costs.

† So, if a plaintiff claims both money and damages, he need not indorse the amount of his claim on the process; (*Perry* v. *Patchett*, T. T. 1834, Ex., 3 D. P. C. 667; S. C. 4 Tyrw. 667); and the rule requiring indorsement of the amount of debt and costs on the writ, held not to apply to an action of debt for penalties for bribery, under the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 54; (*Davies* v. *Loyd*, M. T. 1837, Ex., 6 D. P. C. 173; S. C. 3 M. & W. 69); and the Court refused to set aside process for default of indorsing the amount of debt and costs, where it was not shewn by affidavit that the cause of action was a debt. (*Curwin* v. *Moseley*, T. T. 1832, 1 D. P. C. 432).

An indorsement on a writ of summons, "The plaintiff claims 95*l.* 8*s.* 6*d.* for

the writ, pursuant to Rule 2, Reg. Gen. H. T. 2 Will. 4, and Rule 5, Reg. Gen. M. T. 3 Will. 4.

Per Cur.—No indorsement on the writ of the amount claimed is necessary, where the claim is for damages as well as for a debt.

LONG *v.* WORDSWORTH, M. T. 1832. K. B. 4 *B. & Ad.* 367.

Indorsement does not apply to attornies and prisoners.

THE Rule 11, H. T. 2 Will. 4, requiring indorsement of amount of debt and costs on the copy of the writ—

The Court held, not to apply to the copy filed against an attorney or a prisoner.

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12. *Insertion of the Warnings.*

COOPER *v.* WALLER, M. T. 1834. Ex. 3 *D. P. C.* 167; S. C. 1 *C., M. & R.* 437; S. C. 5 *Tyrw.* 130.

The indorsement must be to pay from the service.

THE indorsement on the process was to pay the amount within four days from the "arrest hereon," instead of "service hereof."

The Court held this a fatal irregularity.

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13. *Indorsement of the Service*.*

MILLER *v.* BOWDEN, T. T. 1831. Ex. 1 *C. & J.* 563; S. C. 2 *Tyrw.* 112.

Rule M. T. 1 Will. 4, is only discretionary.

THE indorsement on process of the day of the month and year on which it was issued was omitted. On motion to set it aside—

The Court held the omission not such irregularity as to grant the application; the Rule of M. T. 1 Will. 4, being only discretionary.

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14. *Of the Copy.*

CHALKLEY *v.* CARTER, M. T. 1835. Ex. 4 *D. P. C.* 480; S. C. 1 *T. & G.* 210.

An omission to state the form

THE copy of the writ served omitted the words "in an action on promises." On motion to set the writ aside—

debt, and £—— for costs," is irregular. (*Treslove* v. *Whitechurch*, T. T. 1840, C. P., 8 D. P. C. 837; S. C. 1 Scott, 415; S. C. 1 M. & G. 426).

If the plaintiff indorses on the writ a larger debt than is due, by which the defendant is misled, and prevented from settling the action, the Court will stay the proceedings on payment of the real debt, with the costs of the writ only; but the application must be made promptly after the particulars are delivered. (*Elliston* v. *Robinson*, M. T. 1834, Ex., 2 D. P. C. 241; S. C. 2 C. & M. 343).

* By Reg. Gen., M. T. 3 Will. 4, it is ordered that the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant, according to the statute.

In the indorsement, pursuant to Reg. Gen., 2 Will. 4, if "execution" is substituted for "service," it is an irregularity, which may be amended on terms. (*Urquhart* v. *Dick*, M. T. 1834, B. C., 3 D. P. C. 17).

The Court held that was an objection to the copy only, it not appearing that the writ itself was not correct.

of action in the copy is an objection*.

PATERSON *v.* BUSBY, M. T. 1839. Ex. 7 *D. P. C.* 868; S. C. 5 *M. & W.* 529.

THIS was a rule calling upon the plaintiff to shew cause why the copy of a writ of summons should not be set aside with costs, on the ground of the omission of the memorandum required by the stat. 2 Will. 4, c. 39 (schedule), (the Uniformity of Process Act), which states that the writ is to be served within four calendar months from the date thereof.

So, the copy must not omit the memorandum to be subscribed.

The Court held, that the copy of the writ was defective for omitting the memorandum.

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15. *Of the Service.*

1.—*How and where served.*

WILLIAMS *v.* PIGGOTT, M. T. 1836. Ex. 5 *D. P. C.* 320; S. C. 1 *M. & W.* 574; S. C. 1 *T. & G.* 953.

A PLAINTIFF entered an appearance for the defendant, on a special affidavit of service, by delivering the copy of the writ to the defendant's maid-servant. On the motion to set aside the proceedings—

What is personal service will be defined by the Court†.

Per Lord *Abinger*, C. B.—If there had been an affidavit of a personal service in this case, the Court might have required the plaintiff to shew that the defendant had been personally served; but that is not the case. The words of the act of Parliament are "personal service;" but there is no definition of personal service. Would sending a letter and receiving an answer be deemed personal service? So, if the process were thrown down, and the party seen to pick it up, would that amount to personal service? Here, the plaintiff made a special affidavit, from which it appears that it was given to the defendant's maid-servant. The defendant now comes to set the appearance aside. The Court ought to be satisfied that she has not seen the writ: but she does not make an affidavit to that effect.

* Where, in the copy of the writ served on the defendant, the letter "s" was omitted in the word "she":—Held, to be immaterial, as it could not mislead. (*Sutton* v. *Burgess*, H. T. 1835, Ex., 3 D. P. C. 489; S. C. 1 C., M. & R. 770; S. C. 5 Tyrw. 320).

The omission of the word "London" in the indorsement on the copy of the writ, held sufficient cause for setting aside the copy. (*Smith* v. *Pennell*, E. T. 1834, Ex., 2 D. P. C. 654).

As to the signature of the clerk of the pleas at the foot of a quo minus, see *Clutterbuck* v. *Wiseman*, H. T. 1832, Ex., 2 C. & J. 213; S. C. 2 Tyrw. 276.

† Before the Uniformity of Process Act, see *Rhodes* v. *Innes*, H. T. 1831, C. P., 7 Bing. 329; S. C. 5 M. & P. 153.

A county of a borough, surrounded by another county, is not within the meaning of the 2 Will. 4, c. 39, s. 20, which applies to serving writs in parts of counties situate within other counties. (*Davis* v. *Skerlock*, H. T. 1839, B. C., 7 D. P. C. 530). A defendant, who seeks to set aside the service of process upon the ground that it was out of the proper county, must shew by affidavit that the

BELL *v.* VINCENT, E. T. 1826. K. B. 7 *D. & R.* 233.

Placing a copy on the defendant's shoulder is good;

ON motion to set aside proceedings, it appeared that process had been placed on the defendant's shoulder, after he had refused to take it.

The Court held this sufficient service, and that it was not waived by serving a second copy on the following day, with notice of declaration.

REDPATH *v.* WILLIAMS, E. T. 1826. C. P. 3 *Bing.* 443.

but process cannot be served by the post.

PROCESS was sent in a letter by post, which was refused to be taken in.

The Court held this insufficient, though the refusal was wilful, and the defendant had for a long time avoided service.

2.—On whom served.

DAVIES *v.* MORGAN, H. T. 1832. Ex. 2 *C. & J.* 237; S. C. 2 *Tyrw.* 288.

Process cannot be served on the wife*.

IN an action ex contractu against several defendants—

The Court will not grant a rule to shew cause why service of the quo minus upon the wife of one of the defendants, who is out of the country, shall not be deemed good service, unless the other defendants will consent not to plead in abatement.

3.—Of Alias and Pluries†.

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16. *Of setting aside the Process, Copy, and Service.*

HALL *v.* REDINGTON, H. T. 1840. Ex. 5 *M. & W.* 605.

If the copy be irregular, mo-

ON a rule to shew cause why "the copy of the writ of summons, served on the defendant, should not be set aside for irregularity."

place where he was served was not on the confines of the county. (*Coulson* v. *King*, E. T. 1832, Ex., 2 C. & J. 474).

* As to process being left at a club-house, see *Ridgway* v. *Bayntun*, T. T. 1833, B. C., 2 D. P. C. 183. The Court refused to allow service at the house of the agent, the defendant being in Ireland, but left the party to proceed under 2 & 3 Will. 4, c. 39. (*Frith* v. *Lord Donegal*, T. T. 1834, B. C., 2 D. P. C. 527). And service on the defendant's attorney, who was prosecuting a cross-action, cannot be made good service, although the defendant be keeping out of the way to avoid the service. (*Parmeter* v. *Reed*, H. T. 1839, B. C., 7 D. P. C. 545). And where an action is brought against a writer to the signet, resident in Edinburgh, as administrator, the Court will not allow service of the writ of summons on the person resident in London, who has acted as agent in obtaining the defendant's letters of administration, to be good service. (*Kerr* v. *Miller*, H. T. 1840, B. C., 8 D. P. C. 322). Where the process could not be served personally, the defendant being a lunatic, and his keeper not allowing him to be seen, the Court refused to allow an appearance to be entered upon the return of nulla bona and non est inventus. (*Starkie* v. *Skilbeck*, T. T. 1837, C. P., 6 D. P. C. 52).

† By Rule, M. T. 3 Will. 4, alias and pluries writs of summons may be directed into other counties. (*Angus* v. *Coppard*, M. T. 1837, Ex., 3 M. & W. 57).

The writ was intituled, "Victoria, by the grace of, Queen" &c., instead of the form given by the Uniformity of Process Act, (2 Will. 4, c. 39), "Victoria" &c. tion should be to set aside the service*.

Per Cur.—We are informed by the Master that the proper form of application is to set aside the service. At all events, it should have been to set aside the *copy* or *service*. We have no means of ascertaining that this is a true copy; and if it is, we cannot set aside the copy.

PHILLIPS *v.* ENSELL, T. T. 1835. Ex. 3 *D. P. C.* 684; S. C. 1 *C., M. & R.* 374; S. C. 4 *Tyrw.* 812.

ON application to set aside proceedings, it being sworn that there had been no personal service on the defendant of any copy of the process— Where no personal service, defendant must swear it did not come to his knowledge†.

The Court held this insufficient, for not going on to swear that it did not come to his possession or knowledge.

COX *v.* TULLOCK, T. T. 1833. Ex. 1 *C. & M.* 531; S. C. 2 *D. P. C.* 47; S. C. 3 *Tyrw.* 578.

ON motion to set aside process— The application should be made

The Court said, a party who, since 2 Will. 4, c. 38, s. 11, seeks

* By Reg. Gen., H. T. 2 Will. 4, "No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

A writ was served on the 25th of October. An application, on the 3rd of November, to set aside the service for irregularity, (the 2nd being on Sunday), was held to be out of time, and that it should have been made on the 1st. (*Tyler* v. *Green*, H. T. 1835, Ex., 3 D. P. C. 439). Where more than eight days have elapsed between the irregularity and the motion, the Court will presume against the party, unless the delay is satisfactorily explained; where the defendant did not expressly negative the writ coming into his hands, and it appeared that his daughter opened the letter containing the writ, the Court refused to interfere, (*Herbert* v. *Darley*, H. T. 1836, Ex., 4 D. P. C. 726). The application to set aside the service of a writ of summons must be made within the time limited for appearance. (*Child* v. *Marsh*, M. T. 1837, Ex., 3 M. & W. 433). Where there is an irregularity in the copy of a writ of summons served, the motion should be to set aside the copy and service, or the service, and not to set aside the copy served. (*Crow* v. *Field*, H. T. 1840, Ex., 8 D. P. C. 231). If the service of a writ of summons is irregular, a rule to set aside both service and copy of the writ does require too much. (*Argent* v. *Reynolds*, E. T. 1838, B. C., 6 D. P. C. 480). Before Uniformity of Process Act, see *Anon.*, H. T. 1833, Ex., 1 D. P. C. 654; S. C. by name of *Hasker* v. *Jarmaine*, 1 C. & M. 408).

The Court refused to set aside the proceedings on the ground that a writ of summons against Thomas G. was served on William G. (*Griffin* v. *Gray*, M. T. 1836, Ex., 5 D. P. C. 331.) Before the Uniformity of Process Act, see *Sumner* v. *Batson*, H. T. 1826, C. P., 11 Moore, 39.

Where the writ was in trespass on the case, and the particulars of demand claimed a debt, and an application was made to set aside the writ as irregular before it appeared that a declaration had been actually filed, the Court refused a motion for setting the writ aside, as being too early. (*Addis* v. *Jones*, M. T. 1834, Ex., 3 D. P. C. 164).

As to waiving objection before Uniformity of Process Act, see *Lloyd* v. *Hawkyard*, M. T. 1827, K. B., 1 M. & Ry. 320.

† Upon a motion to set aside the service of a summons, however positively the defendant and his witnesses may swear to negative the personal service, yet if it is left in doubt by the affidavits on the other side, whether there was a sufficient service or not, the Court will not interfere. (*Morris* v. *Coles*, T. T. 1833, Ex., 2 D. P. C. 79).

to a Judge in vacation.

to set aside process, issued in vacation, for irregularity, is bound to apply to a Judge at chambers, or the plaintiff may go on with proceedings in vacation.

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17. *Effect of Summons being general, and not in autre droit**. See also, ante, tit. *Declaration.*

(*c*) Of the writ of capias.

1. *Process to found the Capias*†. See also, ante, p. 257.

2. *Of the Affidavit for the Order to arrest.* See ante, tits. *Affidavit to hold to Bail, and Arrest.*

3. *Direction of the Writ*‡.

4. *Name of the Parties*§.

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5. *Form of Action.*

Richards *v.* Stuart, M. T. 1833. C. P. 10 *Bing.* 319; S. C. 3 *M. & Scott,* 774.

Writ, trespass on the case, indorsement for a debt:—Held bad.

The writ of capias on which the defendant was held to bail was in an action of trespass on the case—

The Court held, (*Gaselee,* J., dissenting), that the form prescribed by the statute was not complied with, and that the bail-bond should

* Where general process is taken out the plaintiff may declare qui tam or en autre droit, as executor, &c., but not vice versâ; the Court therefore refused to enter an exoneretur for such variance. (*Ackworth* v. *Ryall,* T. T. 1830, K. B., 1 B. & Ad. 19).

† Though a writ of summons must be sued out before capias can be applied for under the 1 & 2 Vict. c. 110, it is not necessary that the defendant should be served with a copy thereof *previously* to his arrest; but where there has been no service of such writ the Court will grant a rule to discharge the defendant out of custody, unless he be served within a limited time. (*Brooke* v. *Snell,* E. T. 1840, Ex., 8 D. P. C. 370).

‡ If a writ of capias be directed to the sheriffs of London, the subsequent insertion of the word "sheriff" (in the singular) will not vitiate it. (*Irving* v. *Heaton,* H. T. 1836, C. P., 4 D. P. C. 638; S. C. 2 Scott, 798.—S. P. *Barker* v. *Weedon,* T. T. 1834, Ex., 2 D. P. C. 707). But a writ of capias directed to the sheriffs of Middlesex is irregular. (*Jackson* v. *Jackson,* M. T. 1834, Ex., 3 D. P. C. 182; S. C. 5 Tyrw. 136). But a mistake in the writ of Middesex for Middlesex, held not to vitiate it, as it could not mislead; but the writ could not be amended. (*Colston* v. *Brown,* M. T. 1834, Ex., 3 D. P. C. 253; S. C. 1 C., M. & R. 833; overruling *Hodgkinson* v. *Hodgkinson,* T. T. 1834, Ex., 2 D. P. C. 535). So, it is no objection to a writ of capias that it is directed to the constable of "the Castle of Dover," instead of "Dover Castle," as in the schedule to the Uniformity of Process Act. (*Frank* v. *James,* T. T. 1837, B. C., 5 D. P. C. 723).

§ A capias, containing no other description of the defendant than his surname, is irregular. (*Margetson* v. *Tugghe,* E. T. 1836, B. C., 5 D. P. C. 9). A defendant, whose name was Cocken, was arrested upon a capias against him by the name of Cocker; he gave a bail-bond to the sheriff in the name of Cocken, sued as Cocker; and the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant, as Cocken, sued by the name of Cocker. The defendant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited; but the Court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of Cocker. (*Finch* v. *Cocken,* E. T. 1835, Ex., 3 D. P. C. 678).

be delivered up to be cancelled. The 2 Will. 4, c. 39, s. 4, (Uniformity of Process Act), requires that where it is intended to hold any person to special bail, the process shall be by writ of capias, according to the form contained in the schedule No. 4, viz. in an action on promises, or of debt, &c.

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6. *Date and Teste of*.*

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7. *Indorsement on†.* As to *Debt and Costs*, see ante, p. 261.

COPPELLO *v.* BROWN, M. T. 1834. Ex. 3 *D. P. C.* 166; S. C. 1 *C., M. & R.* 575; S. C. 5 *Tyrw.* 217.—S. P. SEALY *v.* HEARNE, M. T. 1834. B. C. 3 *D. P. C.* 196.

Plaintiff claims 20*l.* debt with interest from the 10th March last is sufficient.

A CAPIAS was indorsed, "the plaintiff claims 20*l.* for debt, with interest thereon from the 10th day of March last, and 3*l.* for costs," &c. It was contended that the amount of the plaintiff's demand was not specified with sufficient certainty, pursuant to the stat. 2 Will. 4, c. 39—

Per Cur.—This indorsement is sufficiently positive.

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8. *Description of the Plaintiff's and Defendant's Residence.*

KING *v.* MONKHOUSE, M. T. 1834. Ex. 2 *C. & M.* 314; S. C. 2 *D. P. C.* 221.

Plaintiff's residence as 7, Gray's Inn Square, Middlesex, sufficient.

THE plaintiff, an attorney, issued a writ of capias indorsed as follows: "This writ was issued by William Henry King, the plaintiff, in person, who resides at No. 7, Gray's Inn Square, London."

The Court held this a good description of the plaintiff's place of abode in an indorsement of a writ of capias.

PRICE *v.* HUXLEY, M. T. 1833. Ex. 2 *C. & M.* 211; S. C. 2 *D. P. C.* 231; S. C. 4 *Tyrw.* 68.

Omission of defendant's residence fatal‡.

A RULE to set aside the capias and subsequent proceedings in this case for irregularity had been obtained, on the ground that the

* By 2 Will. 4, c. 39, s. 12, every writ of capias shall bear date of the day on which it is issued. Before the Uniformity of Process Act, see *Ardent* v. *Felton*, T. T. 1829, C. P., 6 Bing. 424).

By 2 Will. 4, c. 39, s. 12, it is enacted, "That every writ of capias shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which the same shall issue, or, in case of a vacancy of such office, then in the name of a senior puisne judge of the said Court." (See *Lloyd* v. *Jones*, T. T. 1836, Ex., 5 D. P. C. 161; S. C. 1 M. & W. 549).

† By Reg. Gen., H. T. 2 Will. 4, it is ordered, "That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy, and service and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

‡ The actual or supposed residence of a defendant must be stated in a writ of

residence of the defendant was not stated in the writ, pursuant to 2 Will. 4, c. 39.

Lord *Lyndhurst*, C. B.—The object was the more completely to identify the defendant, so that the right person might be taken. Certain forms have been prescribed by the act, which it is a great public convenience should be adhered to.—Rule absolute.

ROLFE *v.* SWANN, E. T. 1836. Ex. 1 *M. & W.* 305.

And, "Army Pay Office, Somerset House," is bad.

A WRIT which directed the sheriff to take J. S., a clerk in the Army Pay Office, Somerset House, in the city of Westminster, and county of Middlesex—

The Court held to be bad. A blank after the word "of" in the form of the writ of capias given in the schedule to the 2 Will. 4, c. 39, must be filled up with the place of the residence or supposed residence, or where the defendant is or is supposed to be.

WEBB *v.* LAWRENCE, T. T. 1833. Ex. 1 *C. & M.* 806; S. C. 2 *D. P. C.* 81; S. C. 3 *Tyrw.* 906.

But, number of house or parish need not be stated.

THE description of the defendant in a capias was as of a place in a county, without stating the number of the house or parish.

The Court held this sufficient.

ROBERTS *v.* WEDDERBURNE, H. T. 1834. C. P. 1 *Bing. N. S.* 4; S. C. 4 *M. & Scott*, 488.

A pluries must state defendant's residence*.

A PLURIES writ of capias issued after a capias and alias, on which the party was arrested.

The Court held it irregular for not stating the place of residence, although stated in the previous writs.

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9. *Description of the Plaintiff's Attorney.* See ante, p. 260.

capias. (*Ward* v. *Watt*, E. T. 1836, Ex., 5 D. P. C. 94). And where the description of the defendant in a capias was as "late of &c.," where it appeared that no other residence or means of description were known:—Held sufficient. (*Hill* v. *Harvey*, T. T. 1835, Ex., 4 D. P. C. 163; 2 C., M. & R. 307). So, the number of the house or the parish need not be stated. (*Tomkins* v. *Chilcote*, T. T. 1833, B. C., 2 D. P. C. 187). But, a plaintiff is authorized, where the defendant's place of residence is unknown, to treat the place mentioned in the promissory note on which the action is brought as the supposed residence of the defendant. (*Norman* v. *Winter*, H. T. 1839, C. P., 7 D. P. C. 304; S. C. 5 Bing. N. S. 279; S. C. 6 Scott, 378). And, in bailable process, it is not necessary to give a particular description of the defendant's place of residence; a place at which he may be expected to be found is sufficient. (*Welsh* v. *Langford*, E. T. 1834, B. C., 2 D. P. C. 498). The plaintiff may give the best description he can of the place where he is to be found. A variance between the description of the defendant's residence in the affidavit of debt and the capias is immaterial. (*Buffle* v. *Jackson*, E. T. 1834, B. C., 2 D. P. C. 505).

* And it must be stated in the part of the writ prescribed; where indorsed only, held insufficient. (*Lindrage* v. *Roe*, H. T. 1834, C. P., 1 Bing. N. S. 6)

10. *Of the Warnings**.

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11. *Of the Copy.*

HODGKINSON *v.* HODGKINSON, T. T. 1834. K. B. 3 *N. & M.* 564.

THE writ of capias was directed to the "Sheriff of Middlesex," and the copy delivered to the defendant was to the "Sheriff of Middesex."

A variance between the capias and copy as to the county is fatal†.

The Court discharged the defendant out of custody upon his entering a common appearance.

NICOL *v.* BACON, M. T. 1833. C. P. 10 *Bing.* 339; S. C. 3 *M. & Scott*, 812.

ON motion to set aside a writ and copy, it appeared that the writ upon which a defendant was arrested was directed to the sheriffs of London. The copy, which, according to the 4th section of the Statute for the Uniformity of Process, must be delivered to the defendant, was directed to the sheriff of London.

So, the sheriff must be correctly described.

The Court held, that the defendant was entitled, in consequence of such variance, to be discharged upon entering a common appearance.

COOK *v.* VAUGHAN, T. T. 1838. Ex. 6 *D. P. C.* 695; S. C. 4 *M. & W.* 69.

A WRIT of capias described the defendant as a "gentleman," but that addition was omitted in the copy served.

And the defendant's addition must be stated in copy.

The Court held, that the stat. 2 Will. 4, c. 39, s. 4, was not complied with, and that the bail-bond given upon the arrest in such a case should be cancelled.

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12. *Of the Execution.* See, ante, tit. *Arrest.*

* If the warning in a capias is placed at the foot of the writ, it is only necessary in the body to introduce the words "hereunder-written," and not "indorsed hereon" besides. (*Bridgman* v. *Curgenven*, M. T. 1834, B. C., 3 D. P. C. 1).

† The omission of the day of the month in the teste of the copy of the writ, though the month itself is named, is fatal. (*Perring* v. *Turner*, M. T. 1834, B. C., 3 D. P. C. 15).

Where a defective copy of the process is served on the defendant he is not bound to shew that a similar defective copy was delivered to the sheriff; and unless an answer is given by the plaintiff, the defendant will be discharged out of custody. (*Hodd* v. *Langridge*, T. T. 1837, B. C., 5 D. P. C. 721). It is not a sufficient compliance with section 4 of the Uniformity of Process Act, as to delivering a copy of the capias to the defendant, to deliver it at seven o'clock in the evening, when the arrest took place at nine o'clock in the morning. (*Shearman* v. *M'Knight*, E. T. 1837, B. C., 5 D. P. C. 572). Upon a motion to set aside the copy of a capias, on the ground of its not mentioning any county in the description of the defendant, the Court were equally divided—*Tindal*, C. J., and *Gaselee*, J., holding it unnecessary; contra, *Vaughan* and *Bosanquet*, J. J. (*Border* v. *Levi*, M. T. 1834, C. P., 3 D. P. C. 150; S. C. 1 Bing. N. S. 362; S. C. 1 Scott, 270).

13. *Indorsement of the Execution.*

RIDLEY *v.* WESTON, H. T. 1833. C. P. 2 *M. & Scott,* 724.

The day of execution should be indorsed*.

THE sheriff had omitted to indorse on the capias the day of execution, pursuant to the 4th Rule of Mich. Term, 3 Will. 4—

The Court refused an attachment, but granted a rule nisi to shew cause why he should not amend his return, and make such a compensation to the plaintiff as the Court should think fit, and pay the costs of the application.

SHIRLEY *v.* JACOBS, M. T. 1834. C. P. 3 *D. P. C.* 101; S. C. 1 *Scott,* 67.

"Execution" for "service," not bad†.

THE substitution of the word "execution" for "service" in an indorsement on the copy of the writ of capias delivered to a defendant, under Rule 11, Hil. Term, 2 Will. 4—

The Court held no ground for delivering up the bail-bond to be cancelled; but an amendment will be allowed on payment of costs.

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14. *Of the Return.* See tit. *Sheriff.*

NEWLAND *v.* CLIFFE, T. T. 1831. K. B. 3 *B. & Ad.* 530.

The bailiff of a franchise may make the return by name‡.

THE grant of a franchise was in the terms, that G., his heirs and assigns, by his or their bailiff for that purpose by him the said G., his heirs and assigns, from time to time to be deputed, shall and may have the full return of all writs, &c., with a non intromittas to the sheriffs, unless through the default of the said bailiff.

The Court held, that such return might be properly by the bailiff so deputed in his own name.

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15. *Of the Alias and Pluries.*

GREGORY *v.* DES ANGES, T. T. 1836. C. P. 5 *D. P. C.* 193; S. C. 3 *Bing. N. S.* 85; S. C. 3 *Scott,* 534.

The capias need not be returned

THE defendant had been arrested. A rule called upon the plaintiff to shew cause why the service of the writ (an alias), and all

* By Rule, M. T. 3 Will. 4, it is ordered, "That the sheriff, or other officer or person to whom any writ of capias shall be directed, or who shall have the execution or return thereof, shall, within six days at the latest after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and in default thereof shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct."

† In fact, in the indorsement, pursuant to 2 Reg. Gen., H. T. 2 Will. 4, the word "service," and not "execution," must be used, although the defendant has been arrested. (*Colls* v. *Morpeth,* M. T. 1834, B. C., 3 D. P. C. 23).

‡ Before Uniformity of Process Act, see *Smith* v. *Parker,* T. T. 1825, Ex., 1 M. & Y. 496; *Steele* v. *Morgan,* T. T. 1827, K. B., 8 D. & R. 450.

It is ordered, that Judges' orders to return writs, whether of final or mesne process, and to bring in the body, be drawn up without any affidavit. (*Reg. Gen.,* M. T. 1837, Ex., 3 M. & W. 401).

proceedings thereon, should not be set aside for irregularity, and why the bail-bond should not be given up to the defendant or his attorney to be cancelled, upon entering a common appearance. The imputed irregularity was, that the alias writ upon which the defendant was arrested did not shew that the first was returned non est inventus.

previous to issuing the alias*.

Tindal, C. J.—Upon reference to the Uniformity of Process Act, 2 Will. 4, c. 39, I do not find that the return of non est inventus by the sheriff to the first writ of capias is a necessary preliminary to the issuing of an alias. I am confirmed in this inference by referring to other parts of the act. The necessity of such return is confined by the stat. 2 Will. 4, c. 39, to cases where proceedings to outlawry are contemplated, and where the object is to prevent the running of the Statute of Limitations.

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16. *Of concurrent Writs.*

DAVIES *v.* HARDING, E. T. 1834. C. P. 10 *Bing.* 552; S. C. 4 *M. & Scott*, 450.

A PLAINTIFF issued a capias into the county of M., and during the currency of that writ issued another, founded on the same affidavit of debt, into the county of D.

Rule M. T., 3 Will. 4, does not prohibit concurrent writs into different counties.

The Court held, that such second writ was regular and valid. The second writ is, in such case, to be considered as original, and a Judge's order, treating it as an alias, would be set aside.

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17. *Setting aside*†.

* By Rule, H. T. 2 Will. 4, "it shall not be necessary that a pluries capias be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent."

By Rule, M. T. 3 Will. 4, "alias and pluries writs of capias may be directed into other counties."

An affidavit was made before, and filed by, the deputy filazer of Sussex (who also acted in a similar capacity for Cornwall), upon which a capias issued into Sussex, which was returned non est inventus. An alias was then issued into Cornwall (the præcipe upon which such alias was founded referring to the former writ) without any affidavit being made before the officer for Cornwall, or any office copy being left with him, upon which the defendant was arrested:—Held, that such proceeding was regular, and that the alias might be properly issued into Cornwall without making a second affidavit before the officer of that county, or lodging with him an office copy of that which was made before the officer for Sussex. (*Coppin* v. *Potter*, H. T. 1834, C. P., 10 Bing. 441; S. C. 4 M. & Scott, 272).

Before Uniformity of Process Act, see *Willett* v. *Archer*, M. T. 1827, K. B., 1 M. & Ry. 317; *Crown* v. *Bidgood*, M. T. 1826, C. P., 4 Bing. 63).

† By Rule, H. T. 2 Will. 4, "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

Where the meaning of the writ is not altered by the omission of immaterial particles, the Court will not set aside the capias as irregular. (*Forbes* v. *Mason*, M. T. 1834, C. P., 3 D. P. C. 104).

(*d*) OF THE CONTINUANCE OF PROCESS *.

(*e*) OF WRITS OF MONITION †.

Prochein Amy. See tits. *Infant—Parent and Child.*

Proclamation. See tit. *Outlawry.*

Proctor. See tit. *Attorney.*

Profert. See tits. *Bond—Covenant—Deed.*

Prohibition.

See 1 *Will.* 4, *c.* 21.

I. RELATIVE TO THE ECCLESIASTICAL COURT, p. 272.

II. RELATIVE TO COURTS MARTIAL, p. 274.

III. RELATIVE TO THE QUARTER SESSIONS, p. 274.

IV. RELATIVE TO THE RULE, AND APPLICATIONS FOR, p. 275.

V. RELATIVE TO DECLARATION AND PLEAS, p. 275.

VI. RELATIVE TO DAMAGES, JUDGMENT, AND COSTS, p. 275.

I. RELATIVE TO THE ECCLESIASTICAL COURT.

EARL OF BEAUCHAMP *v.* TURNER, T. T. 1839. Q. B. 2 *P. & D.* 497.

Where only a personal an-

PLAINTIFF libelled in the spiritual Court for the subtraction of tithes. Defendant put in his personal answer, in which he stated a

* Before Uniformity of Process Act, see *Baker* v. *Allen*, M. T. 1827, K. B., 7 B. & C. 526; S. C. 1 M. & Ry. 232; *Page* v. *Newman*, T. T. 1828, K. B., 8 B. & C. 489).

Since the Uniformity of Process Act, the signer of writs of summons ought to affix his seal to alias bills of Middlesex. (*Finney* v. *Montague*, M. T. 1833, K. B., 2 N. & M. 804).

† Where a monition was left at the vicarage-house where the incumbent had lately resided, and a copy also had been left with the officiating minister:—Held, to have been duly served within the meaning of the 59 Geo. 3, c. 97, ss. 26 and 75. (*Green* v. *Corden*, H. T. 1836, C. P., 2 Bing. N. S. 127).

claim by a third party as lessee of the plaintiff; and afterwards his plea or responsive allegation, in which there was no mention of any such claim.

swer, a prohibition does not lie*;

The Court refused to grant a prohibition, on the ground that the personal answer of the defendant was not a part of the proceedings on which issue could be raised.

GRIFFITHS *v.* ANTHONY, M. T. 1836. K. B. 5 *D. P. C.* 223; S. C. 1 *N. & P.* 72.

A RULE had been obtained for a prohibition to the Consistory Court of Carmarthen, in the diocese of St. David's, on behalf of Walter and Margaret Anthony, the latter of whom was the executrix of Thos. Griffiths, deceased, against whom a suit had been instituted at the instance of legatees under the will, in the name of the deputy registrar of that Court, and who had exhibited an inventory of all the goods of the deceased. The defendants appeared to the citation, and put in the inventory, to which exceptions were made by the legatees. The defendants put in their answer to those exceptions, and subsequently applied to amend the inventory. The ground on which the rule was obtained was, that the Ecclesiastical Court, having heard exceptions to the inventory, were proceeding to sentence.

nor does it lie to inquire into the truth of an inventory.

Lord *Denman*, C. J.—The case of *Henderson* v. *French* (5 M. & Selw. 407) is quite in point, and the authority of that case has not been got over.—Rule refused.

HART *v.* MARSH, M. T. 1836. K. B. 5 *D. P. C.* 424; S. C. 1 *N. & P.* 62.

A SUIT in the Ecclesiastical Court was promoted against a clergyman, and there was a variety of articles, some alleging matters which were of ecclesiastical cognizance, and others of cognizance in the temporal Court; and the Ecclesiastical Court, after the appearance of the defendant, proceeded to sentence of suspension, reciting, that the articles were, for the most part, sufficiently and in truth fully proved.

On a libel prohibition only lies to receive the cognizable articles.

The Court held, it was incumbent on the party applying for a prohibition after sentence to shew that the Court below proceeded on those articles which allege matters of temporal cognizance.

CHESTERTON *v.* FARLAR, H. T. 1838. Q. B. 7 *A. & E.* 713.

A SUIT for subtraction of church rates was commenced in the Consistory Court of London, and a decree given for the defendant; the plaintiff appealed to the Arches Court, where the decree was

The Court will not assume an erroneous proceeding.

* A defendant cited in the Ecclesiastical Court must appear before he can apply for a prohibition. (*Law, Ex parte*, T. T. 1834, B. C., 2 D. P. C. 528). And in a suit for tithes in the Ecclesiastical Court, if the defendant pleads a plea which raises a question beyond the jurisdiction of the Court, but afterwards waives it, this Court will not grant a prohibition in that stage of the proceedings. (*Cardew* v. *Cottey*, T. T. 1839, B. C., 7 D. P. C. 666).

If an exemption be claimed because of a chapelry, it must be shewn that rates are paid in respect thereof. (*Craven* v. *Saunderson*, E. T. 1837, K. B., 1 N. & P. 666).

reversed. The defendant then appealed to the Privy Council, and the appeal was lodged, but had not been heard.

The Court refused to grant a prohibition to that Court to stay the proceedings in the suit, no illegality appearing on the face of the rate, since an erroneous proceeding could not be assumed.

LAW, *Ex parte*, M. T. 1834. K. B. 4 *N. & M.* 7; S. C. 2 *A. & E.* 45.

The Ecclesiastical Court may order an attorney to bring in the will notwithstanding his lien.

ON motion for a prohibition—

This Court will not grant a writ of prohibition, restraining the Prerogative Court of Canterbury from compelling an attorney to bring the will of a deceased client into that Court and there leave it to be registered, on the ground that he has a lien upon the will for the amount of his bill, due from the deceased.

FREE *v.* BURGOYNE, E. T. 1826. K. B. 5 *B. & C.* 400; S. C. 8 *D. & R.* 179.

The limitation in the 27 Geo. 3, c. 44, extends to clergy as well as laity; but the 27 Eliz., as to error in the Exchequer Chamber, does not extend to prohibition.

ON prohibition—

The Court held, 1st, that the stat. 27 Geo. 3, c. 44, for restraining ecclesiastical suits in respect of fornication or incontinence to a commencement within eight months from the time of the offence committed, applies to such offences when committed by the clergya s well as the laity, and restrains such suits accordingly, when brought for the reformation of the manners, or the health of the soul of the offender; but, 2nd, the 27 Eliz., as to writs of error in the Exchequer Chamber, did not extend to prohibition.

II. RELATIVE TO COURTS MARTIAL.

POE, *In re*, M. T. 1833. K. B. 2 *N. & M.* 636.

No prohibition after sentence confirmed by the Crown.

A COMMISSION for holding a court-martial had been issued, and a party, who had been found guilty upon certain charges which had been exhibited against him, had been sentenced to be dismissed; and that sentence had been ratified and allowed by the King—

The Court held, that this Court had no power to grant a writ of prohibition to restrain the carrying into effect the sentence; that, in short, there was no court or person to whom such a writ could, under those circumstances, be directed. The court-martial and its functions were at an end; the King, by his prerogative, could dismiss without instituting any inquiry by court-martial: the only remedy to the party complaining of the judgment of the court-martial is by petition to the King.

III. RELATIVE TO THE QUARTER SESSIONS*.

* The quarter sessions having allowed certain trustees' accounts, which it was suggested had not been audited by the parish auditors under the General Vestry Act, pursuant to the provisions of that statute, a prospective prohibition to the quarter sessions, forbidding them to allow future accounts under similar circumstances, was refused. (*St. Pancras* (*Auditors*), *Ex parte*, E. T. 1838, B. C., 6 D. P. C. 534).

IV. RELATIVE TO THE RULE, AND APPLICATIONS FOR*.

BODENHAM *v.* RICKETTS, E. T. 1836. K. B. 6 *N. & M.* 537.

A RULE nisi for a prohibition had been discharged—

The Court refused to allow it to be opened upon fresh affidavits, stating facts existing at the time of the previous application.

The Court will not open the rule after discharged.

V. RELATIVE TO DECLARATION† AND PLEAS.

HALL *v.* MAULE, M. T. 1835. K. B. 5 *N. & M.* 455.

To a declaration in prohibition, the defendant had pleaded several matters in different pleas. On a summons before a Judge at chambers, defendant had been compelled to abandon his several pleas; and he then included the several matters in one plea, which was demurred to. The defendant had then obtained a rule calling upon the plaintiff why he should not be allowed to plead several pleas.

Per Cur.—The reason why the defendant could not have more pleas than one in pleading to a declaration in prohibition was, because the King was a party to the suit, as in a qui tam action; and as the King was not expressly named in the statute of Anne, it did not extend to actions in which the King was a party; but since the stat. 1 Will. 4 the King is no longer a party, and the reason fails.

In prohibition several pleas may be pleaded since 1 Will. 4, c. 21.

VI. RELATIVE TO DAMAGES, JUDGMENT, AND COSTS‡.

TESSEMOND *v.* YARDLEY, T. T. 1833. K. B. 5 *B. & Ad.* 458.

UPON a suit in the Ecclesiastical Court for church-rates, the plaintiff had declared in prohibition, and obtained a verdict—

The Court held, that, under 1 Will. 4, c. 21, the Master had no authority to allow the costs incurred in the Ecclesiastical Court before the prohibition.

Costs in Ecclesiastical Court not allowed before the writ of prohibition.

PEUTRESS *v.* HARVEY, T. T. 1830. K. B. 1 *B. & Ad.* 154.

THE plaintiff had, under the terms of an enlarged rule, declared, and the defendant obtained an order for payment of the debt and costs incurred since the rule to declare in prohibition.

Before 1 Will. 4, to obtain costs

* By 1 Will. 4, c. 21, application for writs of prohibition may be made on affidavit only.

† Contents of declarations, in case the party is directed to declare on prohibition, are regulated by the 1 Will. 4, c. 21.

‡ By the 1 Will. 4, c. 21, the judgment is to be that the writ do or do not issue, as the Justice may require. And the party in whose favour judgment shall be given shall be entitled to costs, and the jury may give such damages as they may deem expedient.

Where a rule nisi is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 Will. 4, c. 21, s. 1, that statute only applying to cases where there have been pleadings in prohibition. (*Rex* v. *Kealing*, T. T. 1832, B. C., 1 D. P. C. 440).

there must have been a plea or joinder in demurrer.

The Court held, that the plaintiff was not entitled to further costs. Under 8 & 9 Will. 3, c. 11, s. 3, a party can only recover costs where there has been a plea pleaded, or demurrer joined.

Property Tax.

See 5 & 6 *Vict. c.* 35.

PARKER *v.* RAMSBOTTOM, T. T. 1824. K. B. 3 *B. & C.* 257; S. C. 5 *D. & R.* 138.

After a great lapse of time partners cannot claim property-tax against a retired partner.

A RETIRING partner had, during his continuance in the firm, carried the amount of his advances to his private credit, without deducting the property-tax—

The Court held, that the continuing partners could not, after a long lapse of time, deduct it, especially where it did not appear they had ever accounted for it to Government.

Protest. See tits. *Bills and Notes.*

Probiso Trial. See tit. *Trial.*

Publication. See tit. *Libel.*

Puis Darrein Continuance, Plea of*.

THOMPSON *v.* PENNAL, M. T. 1831. K. B. 2 *B. & Ad.* 968.

On demurrer to a plea of puis darrein con-

AFTER issue joined, one of several defendants in assumpsit pleaded bankruptcy puis darrein continuance in banc, to which the plaintiff demurred.

* By Rule, H. T. 4 Will. 4, it is ordered, "That in all cases in which a plea puis darrein continuance is now by law pleadable in banc, or at Nisi Prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading or the issuing of the jury process, as the case may be: Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge shall otherwise order."

A plea puis darrein continuance held to be independent of a Judge's order to rejoin issuably. (*Bryant* v. *Perry*, M. T. 1828, C. P., 5 Bing. 414; S. C. 2 M. & P. 760).

If one of two defendants plead a plea of bankruptcy puis darrein continuance, the plaintiff cannot, at Nisi Prius, confess this plea to be true, and go on with the case as to the other defendant. (*Pascall* v. *Horsley*, T. T. 1828, N. P., 3 C. & P. 372).

The effect of the Rule of Hil. T. 4 Will. 4, rule 8, where the last day on which the time for pleading the plea puis darrein continuance is on a Sunday, is, to extend the time of pleading to nine days. (*Dudden* v. *Priquet*, H. T. 1839, Ex., 7 D. P. C. 171; S. C. 4 M. & W. 676).

If a plea pleaded puis darrein continuance, good in form, be verified by affidavit, and there be also an affidavit under the Rule H. T. 4 Will. 4, s. 2, the

The Court held, that he ought to make up the record afresh, and enter such plea and demurrer on the roll, and sue out a venire tanquam, and try the issue and assess contingent damages on the demurrer; and the plaintiff, without having joined in demurrer, went down to trial on a venire to try the issue only, and obtained a verdict generally against the defendant, the Court set aside the verdict.

tinuance, there must be a joinder before the cause can be tried.

SHARPE *v.* WITHAM, E. T. 1825. Ex. 1 *M.& Y.* 350

ON a plea puis darrein continuance of bankruptcy—

The Court held the plea to be sufficiently verified by an affidavit averring the plea, to the best of the deponent's knowledge and information and belief, to be true so far as related to the commission, proceedings, and certificate, although not strictly pursuing the requisitions of the 4 Anne, c. 16, s. 11, as to dilatory pleas; semble, the party would be precluded from availing himself of a second affidavit.

The affidavit need not strictl pursue the 4 Anne*.

Quakers and Morabians†.

Qualification. See tits. *Corporation—Election—Game.*

Quantum Meruit and Quantum Valebant‡.

Judge at Nisi Prius will receive it, although there may be reasons to believe that it is pleaded for delay. (*Ludlow Corporation* v. *Tyler*, 1836, N. P., 7 C. & P. 537).

A plea puis darrein continuance may be put in at Nisi Prius upon paper. (*Myers* v. *Taylor*, T. T. 1826, N. P., 1 Ry. & M. 404).

An action on an annuity-deed was commenced against a defendant in May, 1839; a fiat issued against him in June in that year, and he obtained his certificate in December. In July he pleaded non est factum. In January following he applied to a Judge to be allowed to plead his certificate puis darrein continuance, and was refused. In March he applied again at chambers, with the same success, and the plaintiff obtained a verdict at the following assizes, and afterwards signed judgment. The defendant applied to the Court to stay proceedings pursuant to 6 Geo. 4, c. 16, s. 121, and the application was refused. (*Sharpe* v. *D'Almaine*, T. T. 1840, B. C., 8 D. P. C. 664).

* The affidavit in support of a plea puis darrein continuance should be sworn before a Judge of assize, and not before a commissioner: the Court, however, allowed it to be re-sworn at Nisi Prius. (*Bartlett* v. *Leighton*, 1828, N. P., 3 C. & P. 408).

† Stat. 3 & 4 Will. 4, c. 49, s. 1, regulates affirmations to be made by Quakers and Moravians.

In an action for criminal conversation, the plaintiff and his wife being Quakers, the register of their marriage, and proof of its having been celebrated according to the forms of that society, held sufficient. (*Deane* v. *Thomas*, 1830, N. P., 1 M. & W. 361. See 1 Hagg. Con., Appendix, p. 9, n.).

‡ No longer in use since the New Forms, Reg. Gen., T. T. 1 Will. 4.

Quarantine. See 6 *Geo.* 4, *c.* 78.

Quarries. See tit. *Tithes.*

Quare Impedit.

I. RELATIVE TO THE TITLE OF THE PLAINTIFF, AND WITHIN WHAT TIME TO BE BROUGHT, p. 278.

II. RELATIVE TO THE SUMMONS TO RETURN, p. 279.

III. RELATIVE TO THE DECLARATION, p. 279.

IV. RELATIVE TO THE REPLICATION, p. 279.

V. RELATIVE TO THE EVIDENCE, p. 280.

VI. RELATIVE TO THE PROFITS RECOVERABLE, p. 280.

VII. RELATIVE TO THE COSTS, p. 280.

I. RELATIVE TO THE TITLE OF THE PLAINTIFF, AND WITHIN WHAT TIME TO BE BROUGHT*.

GULLY *v.* BISHOP OF EXETER, H. T. 1830. K. B. 10 *B. & C.* 584, *affirming judgment in C. P.*

In quare impedit by a parcener, it suffices to shew seisin and presentation in the party under whom he claimed.

THIS case came before the Court upon a writ of error from the Common Pleas. The action was in quare impedit.

The Court held, that, where a plaintiff in quare impedit claims to present in the fourth turn in right of one of four coparceners, it is a sufficient statement of the title to shew a presentation by the ancestor under whom all the coparceners claimed; and it is sufficient to state, that, in the first instance, the coparceners not agreeing to present, the elder sister presented; and that, on the second turn, J. S. presented in right of the second sister; and that, on the third turn, J. T. presented in right of the third sister; for it will not be presumed that such presentations were other than rightful.

* The period for bringing quare impedit is limited, by the 3 & 4 Will. 4, c. 27, s. 36, to 100 years after adverse possession obtained of the benefice.

APPERLEY *v.* BISHOP OF HEREFORD, E. T. 1833. C. P. 9 *Bing.* 681; S. C. 3 *M. & Scott*, 102.

The ordinary cannot in a quare impedit dispute the title of a third party.

IN quare impedit against the ordinary for disturbing the plaintiff in his right to present to a void turn—

The Court held it was not competent to the defendant to counterplead the plaintiff's title, unless he (the defendant) make title in himself, either as patron or by collation after lapse. The grant of the advowson does not pass the void turn, because it is a chose in action, or (which appears the better reason) for the public utility in guarding against simony.

II. RELATIVE TO THE SUMMONS TO RETURN*.

III. RELATIVE TO THE DECLARATION.

FARNWORTH *v.* BISHOP OF CHESTER, T. T. 1825. K. B. 4 *B. & C.* 555; S. C. 7 *D. & R.* 56.

The declaration must shew a clear title in the plaintiff to present†.

IN quare impedit, it was averred in the declaration, that the plaintiffs, being the greater number of the householders and heads of families in the township to whom the election of the minister then belonged, had duly elected a certain minister.

The Court held, that, even after verdict, the declaration was bad, because it was not averred that the heirs male of the body of the founder, &c., concurred in the election, or that there were no such persons in existence.

IV. RELATIVE TO THE REPLICATION‡.

* In quare impedit, to compel the defendant's appearance, the plaintiffs sued out a summons, which being returned nihil an attachment issued, reciting that the defendant had been summoned to appear on the morning of All Souls; the attachment was also returned nihil, and a grand distress issued into Kent (where the action was brought), and returned (by the plaintiffs' direction) nulla bona, and then a testatum grand distress issued into Middlesex (where the defendant resided), the sheriff being directed to levy thereon 40*s.*:—Held, that the whole process had been irregularly issued and executed; and, therefore, a judgment signed by the plaintiffs for default of defendant's appearance was set aside. (*Tyrell* v. *Jenner*, M. T. 1829, C. P., 6 Bing. 283).

† A declaration by a parcener, shewing that particular persons presented on particular terms, the Court will not presume that such presentations were by usurpation; but if they were so, it was for the defendant to prove the usurpation. (*Gully* v. *Bishop of Exeter*, E. T. 1829, K. B., 10 B. & C. 584). And a count in quare impedit, alleging a right in certain persons to present to a chapel in virtue of their being charged with repairs, is not supported by proof that the repairs are paid out of the poor-rate. (*Shepherd* v. *Bishop of Chester*, H. T. 1830, C. P., 6 Bing. 435).

‡ The plaintiffs alleged in the declaration, that the majority of proprietors of certain estates for the time being within a township had a right, by virtue of a custom, to nominate a certain person in holy orders to be the perpetual curate of the church, and affirmed that they were the majority of such proprietors for the time being, &c., and had nominated W. C., clerk, as a fit and proper person for

V. RELATIVE TO THE EVIDENCE*.

VI. RELATIVE TO THE PROFITS RECOVERABLE†.

VII. RELATIVE TO THE COSTS.

WYNDOWE *v.* BISHOP OF CARLISLE, H. T. 1826. C. P. 3 *Bing.* 404.

Before 4 & 5 Will. 4, c. 39, there being no damages, costs could not be given in quare impedit‡.

THIS was a quare impedit, in which the defendant Fletcher obtained judgment as in case of a nonsuit, in Michaelmas Term, 1825; and the prothonotary having refused to allow him his costs, on a rule to shew cause why he should not be directed to allow them—

Per Cur.—After great consideration, in the case of *Thrale* v. *Bishop of London* (1 H. Bl. 530), and in *Pilfold's case* (10 Rep. 116 a.), it was decided by the latter, that where damages are newly given by a statute subsequent to the Statute of Gloucester, the plaintiff should only recover the damages given, and no costs; and, in the former case, it was held that a defendant obtaining judgment on demurrer in quare impedit, is not entitled to costs, on the ground that no damages are given at common law on the recovery of a spiritual right; and that the costs given by the stat. 8 & 9 Will. 3 are confined to cases where the plaintiff, as well as the defendant, is entitled to them; and we are of the same opinion.

that purpose. The defendants, in their plea, alleged that they were the majority of the proprietors of estates for the time being, &c., and did duly nominate one E. P., clerk, as a fit and proper person for that purpose, with a traverse of the plaintiffs being, at the time of the nomination of W. C., the majority of the proprietors of estates for the time being. A replication, alleging that the defendants did not duly nominate E. P. to be perpetual curate, &c., was held ill, inasmuch as it passed by the traverse in the defendants' plea, and traversed the inducement, which was not material. (*Earl of Harrington* v. *Bishop of Litchfield*, M. T. 1837, C. P., 4 Bing. N. S. 77; S. C. 3 Scott, 371).

* The plaintiff in quare impedit, after tracing his title, and averring the death of a party, a joint-tenant with him for a term of years in the advowson, alleged that he became and was possessed thereof as of an advowson in gross for the remainder, &c., and the bishop took issue in terms of the traverse:—Held, that a fine, shewing the title to be in third persons, was inadmissible, the parties to the suit not both claiming under the parties to the fine. (*Bishop of Meath* v. *Mayor of Winchester*, M. T. 1836, C. P., 3 Bing. N. S. 183; S. C. 3 Scott, 561).

† Where an incumbent, after presentation to a second benefice without dispensation, whereby the first became void de jure, continued to retain possession, and the patron having presented the plaintiff, the latter recovered in quare impedit, and was subsequently inducted:—Held, that he could not, under 28 Hen. 8, c. 11, s. 3, recover the profits, either from the time of his being presented or of suing out the quare impedit, the vacation intended by the act being a vacation de facto. (*Halton* v. *Cove*, M. T. 1830, K. B., 1 B. & Ad. 538).

‡ And, quære, whether costs are given since the 3 & 4 Will. 4, c. 42, s. 34? But the 4 & 5 Will. 4, c. 39, expressly gives costs. Where in quare impedit judgment had been given against the bishop on demurrer, held, that the 4 & 5 Will. 4, c. 39, and 3 & 4 Will. 4, c. 42, s. 34, were to be construed together, and the certificate of the Court exempted him from costs. (*Edwards* v. *Bishop of Exeter*, T. T. 1839, C. P., 7 Scott, 679).

Quarter Sessions. See tit. *Sessions.*

Quiet Enjoyment. See tit. *Covenant.*

Quit Rent. See tit. *Rent.*

Quo Minus. (Abolished.) See tit. *Process.*

Quo Warranto.

I. RELATIVE TO WHEN IT DOES OR DOES NOT LIE, p. 282.

II. RELATIVE TO THE RELATOR, p. 283.

III. RELATIVE TO THE COURT OUT OF WHICH IT MAY ISSUE, p. 284.

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X. RELATIVE TO STAYING PROCEEDINGS, p. 287.

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XII. RELATIVE TO CHANGING THE ATTORNEY, p. 288.

XIII. RELATIVE TO SEVERAL RULES FOR, AND CONSOLIDATION OF, p. 288.

I. RELATIVE TO WHEN IT DOES OR DOES NOT LIE.

REX *v.* BROOKS, T. T. 1828. K. B. 8 *B. & C.* 321.

Where a party in possession of an office six years, Court will not grant quo warranto*;

ON motion for a quo warranto, it appeared that the party had been sworn into, and had exercised a corporate office for more than six years.

The Court, in the exercise of their discretion, and without deciding whether he was protected by the 32 Geo. 3, c. 58, refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer.

REX *v.* JONES, T. T. 1830. K. B. 1 *B. & Ad.* 677.

and, under circumstances, the Court will not grant it on ground of same party holding office of town-clerk and common councilman.

BY the charter of a corporation of a borough, the mayor, burgesses, and commonalty were to elect a town-clerk, who was also to be clerk of assize and prothonotary; and the mayor, recorder, and town-clerk were to hold pleas of certain actions. The mayor, recorder, and twenty common councilmen, were also to make bye-laws for the order and government of the borough; but the latter never officiated in any proceeding where the town-clerk acted, nor

* So, a quo warranto lies not against individuals for usurping a franchise of a mere private nature, and not connected with public government. (*Rex* v. *Ogden*, M. T. 1829, K. B., 10 B. & C. 230). So, the writ does not lie for exercising the office of a guardian of the poor under the new act. (*Rex* v. *Carpenter*, T. T. 1837, K. B., 1 N. & P. 773). And, a party who seeks to disturb another elected to an office, on the ground that he had not a majority of votes, must shew the qualification of the electors, and that another candidate had the majority of those duly qualified, before the Court will grant a quo warranto information. (*Rex* v. *Mashiter*, H. T. 1837, K. B., 1 N. & P. 314). And, where a party had been elected, and had acted as town-clerk previous to the passing of the Municipal Corporation Act, but was not a burgess at the time of his election, and had not taken the oaths of allegiance and supremacy, nor signed the declaration required by 9 Geo. 4, c. 17, s. 2, the Court refused, at the instance of a private individual, to grant a quo warranto information against him to shew by what authority he had exercised the office, for the purpose of shewing that he was not an officer of the corporation, and therefore not entitled to compensation on being removed from his office. (*Rex* v. *Harris*, E. T. 1837, K. B., 1 N. & P. 576). And it will not lie where a town-councillor was a bankrupt at the time of his election; 5 & 6 Will. 4 only applies where bankruptcy takes place after election. (*Rex* v. *Chitty*, M. T. 1836, K. B., 1 N. & P. 78). But, a quo warranto held to lie against a party claiming to act as a commissioner under a local act for paving, &c., (*Rex* v. *Beedle*, T. T. 1835, K. B., 3 Ad. & E. 467); and will lie for an office connected with the return of a member of Parliament. (*Rex* v. *M'Kay*, T. T. 1825, K. B., 4 B. & C. 351; S. C. 6 D. & R. 432). And, it is no objection to granting the writ against individual members of a corporate body at the instance of a private relator, that the objection made to the party holding the office may be made to every member of the corporation, and tends to dissolve it altogether. (*Rex* v. *White*, H. T. 1836, K. B., 1 N. & P. 84).

Where to an application for a quo warranto impeaching the election of the master of a corporate company, upon objections that the body of the electors was narrowed by a bye-law, and also the number of persons eligible:—Held, 1st, that a bye-lawe as to the former might be valid, and its existence inferred by the Court from ancient usage without the intervention of a jury; and, 2ndly, that, although as to the latter such a bye-law would be invalid, yet it would not be inferred from the mere fact of the elections having almost uniformly fallen upon persons of the limited body; and where no reasonable doubt was raised upon the affidavits, the Court refused to grant the information. (*Rex* v. *Attwood*, H. T. 1833, K. B., 1 N. & M. 287).

did he receive any emoluments over which the common council had any controul.

The Court held, that the offices of town-clerk and of a common councilman were not incompatible.

REX *v.* RAMSDEN, T. T. 1835. K. B. 5 *N. & M.* 325; S. C. 3 *Ad. & E.* 456.

BY a local act, governors of the poor elected by the inhabitants were authorized to regulate the poor rates, elect inhabitants out of whom justices were to appoint overseers, and parochial officers (to act as constables), clerks, collectors, &c., and in whom all parish property was to be vested.

So, it will not lie for the office of governor of the poor under a local act.

The Court held, that the office of governor was not such an office for which a quo warranto would lie for usurping it.

II. RELATIVE TO THE RELATOR,

REX *v.* DAVIES, H. T. 1828. K. B. 1 *M. & Ry.* 538.

ON the question whether a member of a borough, who is subject to the bye-laws thereof, is a good relator to call in question the validity of the election of a town-clerk.

A burgess may be a relator as to town-clerk's election*.

Lord *Tenterden*.—Although the burgesses at large may have no share in the election of town-clerk, yet as soon as he is chosen he is a ministerial officer in whom all the burgesses have an interest. The present applicant has therefore a right to question the validity of the election.

REX *v.* OGDEN, M. T. 1829. K. B. 10 *B. & C.* 230.

ON a rule calling upon the defendants to shew cause why an information in the nature of a quo warranto should not be exhibited against them for acting as a corporation, by the name and style of the Freemen and Stallingers of the Borough of Sunderland, without being authorized so to do. This rule had been obtained on affidavits by certain inhabitants of the town of Sunderland, styling themselves freemen of the town of S.—

And against a whole corporation, the information can only be in the name of the Attorney-General†.

Per Cur.—If any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise, and

* Where the relator did not concur in the election of the defendant, although he appeared afterwards to have acted and attended corporate meetings with him:—Held, that this was not a sufficient objection to his sustaining the application for a quo warranto. (*Rex* v. *Benney*, E. T. 1830, K. B., 1 B. & Ad. 684). A relator is entitled to the interference of the Court, though he is acting with others not qualified. (*Rex* v. *Parry*, T. T. 1837, Q. B., 6 A. & E. 810).

A corporator voting and concurring in elections cannot become a relator in an information to impeach them. (*Rex* v. *Slythe*, H. T. 1827, K. B., 6 B. & C. 240).

† But where the party had concurred in the election of others at the time when the same objection to the title of the elected, and of which he sought to avail himself on the motion, was made and overruled:—Held, that he was not a good relator. (*Rex* v. *Parkyn*, M. T. 1830, K. B., 1 B. & Ad. 690).

an information against the whole corporation as a body, to shew by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General. (*Rex* v. *The Corporation of Carmarthen*, 3 Burr. 869).

III. RELATIVE TO THE COURT OUT OF WHICH IT MAY ISSUE *.

IV. RELATIVE TO WITHIN WHAT TIME THE APPLICATION TO BE MADE †.

V. RELATIVE TO AFFIDAVITS FOR.

REG. GEN., M. T. 1839. Q. B. 3 *P. & D.* 1.

The affidavit must shew that the application is made at the instance of the relator,

IT is ordered, "That no information in the nature of a quo warranto be filed without an affidavit, at the time of filing, of being made at the instance of the party as relator, who shall be deemed and named as such in the information, if filed, unless the Court shall otherwise order."

REX *v.* JEFFERSON, M. T. 1833. K. B. 2 *N. & M.* 487.

and must shew who was duly elected ‡.

THE affidavits, impeaching an election, only shewed that bad votes were given for the party whose election was questioned, and that, if the votes only of duly qualified electors had been received, he would not have been elected.

The Court held it insufficient, without shewing who was duly elected.

* The 4 & 5 Will. & M. c. 18, s. 2, is confined to informations exhibited in the King's Bench:—Held, that with respect to informations originally filed in the Court of Chester, and transferred by 1 Will. 4, c. 3, into the King's Bench, they might be prosecuted without entering into the recognizances required under the former act, but that fresh subpœnas ought to issue to found attachments issuing out of the King's Bench. (*Rex* v. *Roberts*, H. T. 1831, K. B., 2 B. & Ad. 63).

† Where a rule nisi for a quo warranto information was granted at the end of Easter Term, calling on the defendant to shew cause on the first day of the ensuing term, and it appeared that two days before Trinity Term commenced the defendant had completed six years' enjoyment of the franchise:—Held, that the application was barred by the 32 Geo. 3, c. 48. (*Reg.* v. *Harris*, H. T. 1840, K. B., 3 P. & D. 266; S. C. 8 D. P. C. 499).

‡ It is no objection to an affidavit in support of an application for the writ, that it is made by a party who cannot himself be a relator, there being otherwise a sufficient one. (*Rex* v. *Browne*, E. T. 1837, K. B., 1 N. & P. 664).

Under Rule Mich. T., 3 Vict., the affidavit in support of a motion for a quo warranto information must state at whose instance the application is made. It is not enough for a party to depose, that, if the Court grant the information, it is his intention to become really and bonâ fide the relator. (*Reg.* v. *Hedges*, M. T. 1840, Q. B., 11 Ad. & E. 163; S. C. 9 D. P. C. 493).

REG. *v.* SLATTER, H. T. 1840. Q. B. 3 *P. & D.* 263.

SECT. 50 of 5 & 6 Will. 4, c. 76, provides, that no person elected a councillor for any borough shall be capable of acting as such until he shall have made and subscribed a certain declaration. Upon application for an information in the nature of a quo warranto, to shew by what authority the party claimed to be a councillor. Upon an affidavit, which stated that "he had accepted the office of town councillor"—

And not merely allege acceptance of the office, but shew the facts attending it.

The Court held, that the affidavit was insufficient, in not stating that those facts had been done which, by the above section, constituted an acceptance.

REG. *v.* QUAYLE, H. T. 1840. Q. B. 11 *Ad. & E.* 508.

ON an application for a quo warranto against a party claiming to be a councillor of a borough, an affidavit alleged he had taken upon himself the office, and acted in that capacity.

But the affidavit of the election need not be in compliance with the 5 & 6 Will. 4.

The Court held the affidavit sufficient without stating the nature of the acceptance, or his compliance with the 5 & 6 Will. 4, c. 74.

VI. RELATIVE TO WHAT QUESTIONS CAN BE RAISED UPON.

REG. *v.* QUAYLE, H. T. 1840. Q. B. 11 *Ad. & E.* 508.

ON a quo warranto—

On motion for quo warranto, the Court will not enter into the qualification of voters*.

The Court said, although it might open the burgess-roll, yet it would not, on motion for the quo warranto, enter into questions as to the qualification of voters when they had no opportunity of deciding those objections.

REX *v.* THOMAS, E. T. 1838. Q. B. 3 *N. & P.* 288.

PRIOR to the time when the 5 & 6 Will. 4, c. 76, came into operation, the town-clerk of Tewkesbury held the offices of town-clerk and clerk of the peace of that borough conjointly, and was continued in both offices by the new town council until July, 1836, when he resigned them. The council elected, on the 20th of July, one L. to be town-clerk, and at a subsequent meeting on the 25th of July, resolved, that the resolution of the 20th of July should be rescinded, and appointed one T. to be town-clerk. The borough did not receive a commission of the peace until August, when T. was also nominated clerk of the peace. On an application made by S. for a quo warranto against T. for exercising both offices—

It will be assumed the party was duly elected.

The Court discharged the rule, on the ground that it must be taken that he was acting as clerk of the peace under his valid appointment until the contrary was shewn.

* Where a charter of incorporation had been granted, the Court discharged a rule for a quo warranto information, at the instance of a private relator, against a coroner appointed under the charter, on the ground that all the objections taken to his title applied equally to the charter itself, and that the charter itself could not be attacked through him. (*Reg.* v. *Taylor*, E. T. 1840, Q. B., 3 P. & D. 652; S. C. 9 D. P. C. 548).

On a quo warranto, the Court will enter into an objection to the want of notice to justices under the 13 Geo. 2, c. 18, with respect to an application to remove an order appointing overseers. (*Reg.* v. *How*, M. T. 1839, Q. B., 11 Ad. & E. 159).

VII. RELATIVE TO THE PLEADINGS.

Reg.-Gen., H. T. 1827. K. B. 6 *B. & C.* 267.

No objection to be raised in the pleadings not specified in the rule to shew cause for granting the information*.

By Rule, "whereas much vexation and expense have been occasioned to defendants on informations in the nature of quo warranto, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the Court; it is ordered, that from henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the Court, or of some Judge thereof."

Rex *v.* M'Kay, T. T. 1825. K. B. 4 *B. & C.* 351; S. C. 6 *D. & R.* 432.

The Crown has a right to traverse the facts stated as inducement to the defendant's traverse.

On a quo warranto, the defendant's pleas shewed that he had been elected to the office, and traversed "that the office of bailiff was an office touching the rule and government of the borough." There were general replications taking issue upon all the facts stated, as inducement to the defendant's traverse, (but they did not notice the traverse), and special replications setting up various customs as to the election of bailiffs of the borough. Demurrer and joinder.

The Court held, first, that the defendant not having traversed, that the office "was one of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in Parliament," had admitted it to be so, and that for such an office a quo warranto would lie; and, secondly, that the Crown has a right to traverse the facts stated in the indictment; and, lastly, that the general replications being clearly good, and the demurrer being to all the replications, judgment must be given for the Crown.

Rex *v.* Hill, T. T. 1825. K. B. 4 *B. & C.* 426; S. C. 6 *D. & R.* 593.

The Crown will be entitled to

To an information in the nature of quo warranto for usurping the office of burgess, the first six and last pleas stated a custom and

* To an information for usurping the office of justice within a borough, defendant pleaded that he was elected at a corporate meeting, where a majority of the aldermen and capital burgesses were present. Replication, that, at the supposed election, five capital burgesses (described by their names) and no others were present, and that they were not the major part of the capital burgesses. Rejoinder, that, at the election, besides the five capital burgesses named in the replication there were present K. & T., being then capital burgesses, and that the five capital burgesses named in the replication, together with K. & T., were the major part of the capital burgesses. Surrejoinder, that K. and T., before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen, and that before the defendant's election two other persons were elected, and admitted as capital burgesses, in the room and stead of K. and T. Rebutter, that, at the election of K. and T. as aldermen of the borough, the major part of the aldermen were not assembled, and that after the election of K. and T., and before the election of the defendant as justice, and whilst K. and T. exercised the office of aldermen, informations in quo warranto were filed against them, and judgment of ouster given, with a traverse that K. and T. ever were aldermen. Demurrer:—Held, that, notwithstanding the judgment of ouster, K. and T. could not be considered as having attended at the election of the defendant as capital burgesses, and the judgment must be for the Crown. (*Rex* v. *Hubball*, M. T. 1826, K. B., 6 B. & C. 139).

corresponding bye-law to hold courts for the election of burgesses, and notice thereof given by ringing a bell.

judgment where pleas disclose customs bad in point of law.

The Court held, that such custom was unreasonable, the number of burgesses appearing to be indefinite, and many residing out of hearing, and no specific day or hour being fixed by custom or charter for such elections taking place; and that the plea was bad, and therefore the Crown was entitled to judgment.

VIII. RELATIVE TO WHEN EVIDENCE.

LANCAM *v.* LOVELL, T. T. 1834. C. P. 9 *Bing.* 465; S. C. 2 *M. & Scott,* 843; S. C. 6 *C. & P.* 437.

A quo warranto not returned or judgment thereon is not evidence.

IN an action of debt by the lessee of the corporation of N., for toll traverse for a waggon, and a market toll for cattle, it was held that an information of quo warranto by the Attorney-General of Queen Elizabeth against the corporation, in respect of the customs they claimed and used, was not receivable in evidence, as it did not appear that it was returned or prosecuted; such an information, like all indictments, not being evidence, unless there be the finding of a jury upon it.

IX. RELATIVE TO THE TRIAL*.

X. RELATIVE TO STAYING PROCEEDINGS†.

XI. RELATIVE TO COSTS. See *Vict. c.* 78, *s.* 20.

REX *v.* ROBERTS, E. T. 1838. Q. B. 3 *N. & P.* 395.

Proceedings commenced before the 1 Vict. c. 78 do not entitle the prosecutor to costs‡.

INFORMATION in the nature of a quo warranto against the defendant for exercising the office of alderman of the borough of Carnarvon—

The Court held, a prosecutor was not entitled to costs, under the 1 Vict. c. 78, s. 20, where the proceedings are carried on, and the defendant succeeds in obtaining judgment through the operation of sect. 2.

* The defendant or relator must begin, according to whom the affirmative is thrown. (*Rex* v. *Yeates*, 1824, N. P., 1 C. & P. 323).

† Where, pending a quo warranto for exercising the office of a councillor of a borough, the 7 Will. 4 & 1 Vict. c. 78 passed, which would have been an answer to the information:—Held, that the relator was entitled to stay the proceedings, with costs down to the passing of the act, notwithstanding a suggestion by the defendant that he had a defence independently of the act, (not stating it), and was desirous of going to trial. (*Reg.* v. *Hooper*, T. T. 1838, K. B., 9 Ad. & E. 680).

‡ The exemption of costs to parties who discontinued upon the passing of 7 Will. 4 & 1 Vict. c. 78, s. 20, held to be limited to the case of those discontinuing at the time of the passing of the act, and not where the application to discontinue was delayed until after the decision of the Court obtained in another case. (*Reg.* v. *Roberts*, M. T. 1837, K. B., 3 N. & P. 592; S. C. 7 Ad. & E. 441). And where the election of assessor had been held before a party claiming to be mayor, whose title to the office was bad, and a rule nisi for a quo warranto had been obtained before the passing of 7 Will. 4 & 1 Vict. c. 78, the defendant not having paid the costs up to that time, the rule was made absolute; sect. 29,

XII. RELATIVE TO CHANGING THE ATTORNEY*.

XIII. RELATIVE TO SEVERAL RULES FOR, AND CONSOLIDATION OF.

REX *v.* LANGHORN, M. T. 1833. K. B. 2 *N. & M.* 186.

After two rules discharged for a quo warranto a third will not be granted on the same ground†.

A RELATOR had twice obtained rules nisi for informations in the nature of a quo warranto, calling upon a party to shew why he exercised the office of mayor of a borough, which rules had been discharged upon cause shewn—

The Court would not allow the same relator, on an application against the succeeding mayor, to raise the same question as to the title of the former mayor to exercise the office.

Railways‡.

I. RELATIVE TO THE SHARES AND CALLS, p. 289.

II. RELATIVE TO THE CONSTRUCTION OF STATUTES AND CONTRACTS, p. 289.

III. RELATIVE TO THE COMPANY'S LIABILITY AS CARRIERS, p. 290.

IV. RELATIVE TO WAYS CONNECTED WITH, p. 290.

V. RELATIVE TO CONTRACTS NOT TO OPPOSE, p. 291.

VI. RELATIVE TO NOTICE OF ACTION, p. 292.

VII. RELATIVE TO PLEADINGS CONNECTED WITH, p. 292.

providing for the discontinuance of proceedings only, being conditional on payment of costs. (*Rex* v. *Jones*, M. T. 1837, K. B., 7 Ad. & E. 430; S. C. 2 N. & P. 577).

As to costs before 1 Vict. c. 78, see *Rex* v. *M'Keay*, T. T. 1826, K. B., 5 B. & C. 640; S. C. 8 D. & R. 293; *Rex* v. *Watlin*, H. T. 1830, K. B., 1 B. & Ad. 50; *Reg.* v. *Dudley*, T. T. 1839, B. C., 7 D. P. C. 700.

* Where the same attorney acts for the relator and defendant the Court will change the attorney for the prosecution, although there be no collusion, and the party is proceeding bonâ fide. (*Reg.* v. *Alderson*, M. T. 1839, Q. B., 3 P. & D. 1).

† And where a previous application had been discharged on the affidavits in answer, and a second was made on the same grounds, impeaching the former opposing affidavits, the Court discharged the rule without allowing the merits to be gone into. (*Rex* v. *Orde*, M. T. 1838, Q. B., 8 Ad. & E. 420, n.).

The Court has not power to compel the relators and defendants in several quo warranto informations to submit to be bound by the result of one, although the objection in all is the same. (*Reg.* v. *Cozens*, M. T. 1837, Q. B., 6 D. P. C. 3; S. C. 2 N. & P. 164).

‡ See 3 & 4 Vict. c. 92, regulating railways.

VIII. RELATIVE TO COSTS CONNECTED WITH, p. 293.

IX. RELATIVE TO MANDAMUS CONNECTED WITH, p. 294.

I. RELATIVE TO THE SHARES AND CALLS.

HIBBLEWHITE *v.* M'MORINE, H. T. 1840. Ex. 6 *M. & W.* 200.

Where a statutory form of conveyance of shares is given it must be in the form directed by the act, though the necessity of such form may be waived by agreement*.

IN an action for not accepting shares in a railroad which, by the contract, were to be transferred and paid for by the 1st of March, or any intermediate period, paying for them at par with all calls, the plaintiff binding himself to execute a legal transfer to the defendant on that day; it appearing that the plaintiff had procured the transfer from a third party, executed as to the name of the transferee in blank, which he tendered on the 1st of March to the defendant, and that calls due before that day had not been paid as required by the local act previous to any transfer—

The Court held, upon objection, 1st, that the plaintiff having contracted for a conveyance from him, it must be intended to be a conveyance in the statutory form, and upon the implied covenant of the plaintiff for title, and that the implied covenant from the third party was not the same thing; 2ndly, that the objection upon the local act had been waived by an agreement by the defendant, that the plaintiff should not pay such instalments; and, lastly, that the conveyance required by the act being clearly one by deed, an instrument with the name of the vendors in blank at the time of sealing and delivery was void.

BRADLEY *v.* HOLDSWORTH, H. T. 1838. Ex. 3 *M. & W.* 422.

If by the statute the shares are to be personal property the Statute of Frauds does not apply.

A RAILWAY statute expressly declared that the shares should be personal property to all intents and purposes.

The Court held, that a sale was not within the Statute of Frauds, as of an interest in land, and would be good although by verbal contract, and so even without such clause.

HASE *v.* WARING, H. T. 1838. Ex. 3 *M. & W.* 362.

The mere entry of names in the transfer book is no evidence of title.

IN this case—

The Court said, to prove the ownership of shares under the Great Western Railway Act, (5 & 6 Will. 4, c. 107), it is not enough to shew that the alleged owner's name is entered as vendee of the shares in the company's register book of transfers. (sect. 158).

II. RELATIVE TO THE CONSTRUCTION OF STATUTES AND CONTRACTS†.

* After verdict the Court will presume the publication of the notice of making a call, as well as that the defendant's subscription was by deed. (*Great North of England Railway* v. *Biddulph*, E. T. 1840, Ex., 7 M. & W. 243).

† The words "recovering damages" do not include damages which never may happen. (*Lee* v. *Milner*, T. T. 1837, Ex., 2 M. & W. 824). Where lands,

III. RELATIVE TO THE COMPANIES' LIABILITY AS CARRIERS*. See, also, tit. *Carrier.*

IV. RELATIVE TO WAYS CONNECTED WITH.

MONMOUTH CANAL COMPANY *v.* HARFORD, M. T. 1834. Ex. 1 *C., M. & R.* 614; S. C. 5 *Tyrw.* 68.

The occupier's right to cross a railway, if for twenty years, must be proved.

TRESPASS for breaking and entering one close of the plaintiff, called the railroad, and one other close formerly used as a railroad, and damaging the soil of the last-mentioned close. Plea alleged, that the occupiers of the adjoining closes had for twenty years, of right and without interruption, been accustomed to use the privilege and easement of passing and repassing, and laying down tram-roads across the plaintiff's railroad. Replication, traversing the claim of right in the language of the plea. New assignment of other and sufficient purposes.

The Court held, upon the issue raised on the pleas justifying under the twenty years' uninterrupted enjoyment of the right, that the plaintiff might shew, that the defendants had from time to time applied for leave to make the cross tram-roads, and that it was not necessary for them to reply specially such license under the 2 & 3 Will. 4, c. 41, s. 5; but that, if defendants had the right, they must prove it.

DAND *v.* KINGSCOTE, H. T. 1840. Ex. 6 *M. & W.* 174.

Under a reservation of suffi-

CONVEYANCE of lands in fee-farm, in the manor of A., reserved all mines, with sufficient way-leave and stay-leave to and from the

required to be taken for the purposes of a railway, had been taken after an inquisition by the sheriff in ejectment by the owner:—Held, 1st, that such inquisition need not state the compliance with every preliminary required by the act as a proviso and defeazance, and that to do away with the effect of the inquisition the non-compliance ought to come from the other side; 2ndly, that a power to deviate from the intended line involved in it the power to make all necessary and incidental cuttings and embankments, reasonable and proper thereto; 3rdly, that the plaintiff could not object that the name of a third party whose lands were taken was omitted in the reference book, and his consent was sufficient; and, lastly, that the powers of taking such inquisition being under the original act, which had expired, but its power being revived as if re-enacted in the subsequent act, it was sufficient, although the payment of the value found had not been made into the bank until after the expiration of the time limited by the original act; and that the last act gave effect to all the proceedings taken under the first act. (*Doe* d. *Payne* v. *Bristol and Exeter Railway*, H. T. 1840, Ex., 6 M. & W. 320).

In construing the contract the option of time is with the party to do the first act. (*Hare* v. *Waring*, H. T. 1838, Ex., 3 M. & W. 362).

* A statute, creating a corporation for the purpose of making a railway, enabled them to carry passengers and goods, if they should think fit, and also provided that they should not be liable for loss or injury to articles carried on the railroad belonging to passengers, except their articles of clothing of certain weight and dimensions; to a declaration against a company as common carriers for the loss of a trunk, &c., they pleaded that the trunk was carried with the plaintiff as a passenger, and that it did not contain his articles of clothing. The plaintiff replied de injuriâ:—Held, that this was an argumentative traverse, that the goods were delivered to the defendants as common carriers, and, therefore, the replication was inapplicable. (*Elvell* v. *Grand Junction Railway*, H. T. 1840, Ex., 8 D. P. C. 225; S. C. 5 M. & W. 669).

said mines, with covenants for making compensation for breaking ground, &c., in which any pits should thereafter happen to be sunk, &c.; a like conveyance, &c., was also, at the same date, made of lands in H., an adjoining manor.

cient way-leave and stay-leave to and from mines, railways may be included*.

The Court held, that the kind of way was not confined to such as were in esse at the date of the conveyance, and that a railway over the lands with fences, excluding the owner of the soil altogether, might be made, when found to have been properly designed and constructed, with no unnecessary ground taken nor injury done, being for the purpose of shipment, when found to be a purpose reasonably beneficial for the working of the mines, but that the easements reserved by the deeds could be exercised only for the working of the mines in each, and that the carrying the mineral produce of H. over the railway land in A. was a trespass, and unjustifiable; held also, that, under the reservation of the right of sinking pits, was incident the right to erect steam and other engines for the draining of ponds, and for the supply of water thereto.

V. RELATIVE TO CONTRACTS NOT TO OPPOSE.

Howden (Lord) *v.* Simpson, T. T. 1839. Q. B. 10 *Ad. & E.* 793.

An agreement under seal between plaintiff, a peer, and defendants, recited that a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into Parliament, according to which the line would pass through plaintiff's estate, and near his mansion, and that he was a dissentient, and opposed the passing of the bill; that defendants had proposed that if he would withdraw his opposition and assent to the railway, they would endeavour to deviate the proposed line, and plaintiff

A contract by a peer not to oppose a bill for a sum of money, and that the line should not pass over his land, is illegal.

* By the Hull and Selby Railway Act, (6 Will. 4, c. 80, s. 69), it is provided, "That when any part of any carriage, horse, or foot road, railway or tram-road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., for transporting, &c. of goods and merchandize, as the said road, quay, wharf, slope, or other communication, so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low-water mark the defendants constructed their railway (in the line prescribed by the act of Parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous:—Held, that the plaintiff's wharf was thereby injured within the meaning of this section (which was not confined to an injury done bodily to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future, temporary, or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act. (*Bell* v. *Hull and Selby Railway Company*, T. T. 1840, Ex., 6 M. & W. 699).

agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition, and give his assent; and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff 5000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to further, compensation in the event of the deviating line not being ultimately adopted, and without prejudice to such further compensation for any damage, as in the agreement aftermentioned.

The Court held, that the contract was a fraud on the Legislature.

VI. RELATIVE TO NOTICE OF ACTION*. See, also, tit. *Action, Notice of.*

VII. RELATIVE TO PLEADINGS CONNECTED WITH.

SOUTH-EASTERN RAILWAY COMPANY *v.* HEBBLEWHITE, T. T. 1840. Q. B. 4 *P. & D.* 247.

In an action for calls, defendant cannot plead as to the legality of the meetings of the directors, or want of notice of calls being made†.

BY a railway act, a company were allowed, in debt for calls, to declare generally that the defendant, being a proprietor of shares, was indebted to the company in such a sum as the calls should amount to, whereby an action had accrued, without setting forth the special matter; and it was also provided that at the trial of such an action it should only be necessary to prove that the defendant at the time of making such calls was the proprietor of a share, and that such calls were in fact made, and that such notice was given as directed by the act, without proving the appointment of the directors who made such calls, or any other matter whatsoever. On motion for leave to plead several matters:—1. Nunquam indebitatus; 2. That defendant was not a proprietor; 3. That the shares were forfeited; 4. That at the meetings at which the calls were made there was not present a competent number of directors who had paid up previous calls; 5. That no notice had been given of the calls (as required by the act); 6. That no time or place for payment of the calls had been appointed (as required by the act); 7. That the calls were not made for the purposes of the undertaking; 8. That the calls were not made upon all the shareholders (as required by the act); 9. That the calls were not made by competent persons—

The Court allowed the three first pleas only.

* Where the act declared that no action should be brought against any person for anything done in pursuance of it, unless within twenty-one days notice was given to the intended defendant:—Held, to include the company, and that they were entitled to notice of an action for obstructing the road which the plaintiff claimed to use. (*Boyd* v. *Croydon Railway Company*, T. T. 1838, C. P., 4 Bing. N. S. 669; S. C. 6 D. P. C. 721; S. C. 4 Scott, 461).

† The London and Brighton Railway Act (1 Vict. c. 119, s. 148) provided, that, in an action for calls, it shall be sufficient for the Company to prove that the defendant was a proprietor of shares at the time of the calls being made. The Court refused to allow a defendant to plead, in addition to a plea that he was not

VIII. RELATIVE TO COSTS CONNECTED WITH.

REX *v.* GARDINER, H. T. 1837. K. B. 1 *N. & P.* 308.

A COMPENSATION clause in a railway act enacted, that the value was to be settled by a jury; and that in case the jury should give a greater sum than had been offered by the company, "all the costs of summoning the jury, and the expenses of witnesses," should be defrayed by the company; but if the jury should give the same or a less sum than had been offered, one moiety of the said costs and expenses was to be defrayed by the party to whom the lands be-

Under terms "expenses of summoning jury, and taking verdict," costs of fees to counsel and costs of attorney not included.

a proprietor, a plea that he had ceased to be a proprietor before the calls were made by reason of the non-payment of previous calls, and a plea that he had forfeited his shares after the making of calls, and before the commencement of the action. (*London and Brighton Railway* v. *Fairclough*, H. T. 1840, C. P., 6 Bing. N. S. 270; S. C. 8 D. P. C. 278). And, in case for injury to the plaintiff's reversionary interest, the defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be tenant in the declaration was not tenant. The defendants were a company incorporated by act of Parliament, which enabled them to plead the general issue and give in evidence that the act complained of was done in pursuance of the authority of that act. The Court refused to allow the other pleas, together with the general issue. (*Fisher* v. *Thames Junction Railway Company*, T. T. 1837, B. C., 5 D. P. C. 773). So, in an action for not accepting railway shares the Court refused to allow the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no such note. (*Sykes* v. *Reeves*, H. T. 1838, Ex., 6 D. P. C. 384). And, in an action for calls by a railway company, the terms of whose act requiring it to be first proved that the party was a proprietor, and due notice of the calls having been given, the Court refused leave to the defendant to join with pleas denying those facts others raising the question that the calls were made for other than the purposes of the act, and other deviations from the line not warranted, and that fewer shares had been allotted than the act required, as against the policy as well as terms of the act. (*London and Brighton Railway* v. *Wilson*, M. T. 1839, C. P., 6 Bing. N. S. 135; S. C. 8 D. P. C. 40).

By 6 & 7 Will. 4, c. 121, s. 49, the directors were empowered to make the calls in manner therein mentioned; and to sue further, in case of non-payment, by action of debt; or otherwise, in their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the company, provided that no advantage should be taken of any such forfeiture until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the company within six months after such forfeiture should so happen; which declaration should, ipso jure, be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded, that, by reason of having neglected to pay calls on his shares, they were, in pursuance of the act, declared by the directors to be forfeited, and the directors exercised and declared their option, according to the act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture:—Held, on special demurrer, that the plea was bad for not shewing that the shares were declared to be forfeited at the general or special meeting of the company, according to the provisions of the act. (*Edinburgh and Leith Railway Company* v. *Hebblewhaite*, T. T. 1840, Ex., 6 M. & W. 707; S. C. 8 D. P. C. 802).

To an action of trespass for breaking the plaintiff's close, and laying a railroad thereon, the defendant justified under the reservation in certain deeds. The plaintiff new assigned to the plea, that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; for which there was judgment by default:—Held, that on these pleadings the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorized by the reservation. (*Dand* v. *Kingscote*, H. T. 1840, Ex., 6 M. & W. 174).

longed, and a subsequent clause enacted that the party with whom the company should have any dispute should enter into a bond to pay his "proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses," in case any part of such costs should fall upon him.

The Court held, that the words "the costs of taking such verdict" did not mean the costs of trial, and that the fees of counsel and the costs of the attorney respecting the preparing for and attendance at the trial could not be allowed.

IX. RELATIVE TO MANDAMUS CONNECTED WITH*. See, also, tit. *Mandamus.*

Rape.

I. RELATIVE TO THE PERSONS CAPABLE OF COMMITTING, p. 294.

II. RELATIVE TO THE PERSONS ON WHOM COMMITTED, p. 295.

III. RELATIVE TO WHAT CONSTITUTES, AND CIRCUMSTANCES UNDER WHICH IT WAS COMMITTED, p. 295.

IV. RELATIVE TO THE INDICTMENT, p. 295.

V. RELATIVE TO THE EVIDENCE, p. 296.

VI. RELATIVE TO THE PROCEEDINGS AT THE TRIAL, p. 296.

VII. RELATIVE TO THE JUDGMENT, p. 296.

I. RELATIVE TO THE PERSONS CAPABLE OF COMMITTING†.

* The Court refused a mandamus to a railway company to compel them to convey goods along their rail, no clause in their act of incorporation requiring them to carry all goods offered for conveyance, although they had agreed with certain persons to carry their goods to the exclusion of all others. A mandamus will not be granted to enforce the general law of the land if an action will lie, although in some cases it will be granted even where an indictment may be preferred. (*Robins, Ex parte*, H. T. 1839, B. C., 7 D. P. C. 566).

† The presumption of law that an infant under the age of fourteen is unable to commit a rape is not affected by the stat. 9 Geo. 4, c. 31, ss. 16 & 17. (*Rex v. Groombridge*, 1836, N. P., 7 C. & P. 582). Where the prisoner under

II. RELATIVE TO THE PERSONS ON WHOM COMMITTED*.

III. RELATIVE TO WHAT CONSTITUTES, AND CIRCUMSTANCES UNDER WHICH IT WAS COMMITTED†.

IV. RELATIVE TO THE INDICTMENT‡.

the age of fourteen was charged with carnally knowing and abusing a child under ten years:—Held, that the same rule applied as to the case of rape, and that he could not be convicted, although proved of full puberty; (*Reg.* v. *Jordan*, 1839, N. P., 9 C. & P. 118.—S. P. *Rex* v. *Philip*, 1838, N. P., 8 C. & P. 736); but may be convicted of the assault under 1 Vict. c. 85, s. 11. (*Reg.* v. *Brimilow*, 2 Moo. C. C. 122; S. C. 9 C. & P. 366).

* Attempting to carnally know and abuse a girl between the ages of ten and twelve is not an assault if the girl consents to all that is done, but is a misdemeanour. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanour of attempting to commit the misdemeanour of carnally knowing and abusing her. (*Reg.* v. *Martin*,, 1839, N. P., 9 C. & P. 213; S. C. 2 Moo. C. C. 123). It is not an assault, as the consent of the girl puts an end to the charge of assault. (*Rex* v. *Meredith*, 1838, N. P., 8 C. & P. 589). And the offence of carnally knowing and abusing a female child under ten years old is not a felony which includes an assault within the stat. 1 Vict. c. 85, s. 11, even though it be stated in the indictment for the felony that the prisoner made an assault on the child. (*Rex* v. *Banks*, 1838, N. P., 8 C. & P., 574).

† The 9 Geo. 4, c. 31, s. 18, enacts, that it shall not be necessary, upon the trial for the crime of rape, and of carnally abusing girls under the respective ages of ten and twelve years, to prove the actual emission of seed, in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only.

In cases of rape, &c. the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence. (*Rex* v. *Cozins*, 1834, N, P., 6 C. & P. 351). And, where the jury found that there had been penetration, but no emission, held, by the fifteen Judges, that the prisoner had been rightly convicted of the rape. (*Rex* v. *Cox*, 1832, N. P., 1 Moo. C. C. 337; S. C. 5 C. & P. 297, overruling *Rex* v. *Russell*, 2 M. & M. 122). Though it is not necessary in order to complete the offence of rape that the hymen should be ruptured, provided it is clearly proved that there was penetration, yet where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain the charge. (*Rex* v. *M'Rue*, 1838, N. P., 8 C. & P. 641). In a case of rape, since the passing of the stat. 9 Geo. 4, c. 31, s. 18, the only question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c. discussed before judges and juries. Therefore, though it appear from the evidence, beyond all possiblility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape. (*Reg.* v. *Allen*, 1839, C. C. C., 9 C. & P. 31; S. C. *Reg.* v. *Jordan*, Id.) But penetration without rupture of hymen, before stat. 9 Geo. 4, c. 31, was not sufficient. (*Rex* v. *Gammon*, 1832, N. P., 5 C. & P. 321; sed vide 1 East, P. C. 438).

If a person gets into the bed of a married woman, and by a fraud upon her have a connection with her by her consent, she believing it to be her husband, and unresisting because she believes it to be her husband, this is not a rape; but if the person be indicted for a rape he may be found guilty of an assault under the stat. 1 Vict. c. 85, s. 11. (*Reg.* v. *Saunders*, 1838, N. P., 8 C. & P. 265.—S. P. *Reg.* v. *Williams*, 1838, N. P., 8 C. & P. 286).

‡ Where two prisoners were charged in several counts as principal and accessary in rape, and in others as aiders to principals unknown, and a general verdict against one:—Held, that the conviction on the count charging the prisoner as

V. RELATIVE TO THE EVIDENCE*.

VI. RELATIVE TO THE PROCEEDINGS AT THE TRIAL†.

VII. RELATIVE TO THE JUDGMENT‡.

Rates.

See, also, tits. *Highway—Poor.*

MIDDLETON *v.* MELTON, M. T. 1829. K. B. 5 *M. & Ry.* 264.

A collector's private book is evidence against his sureties.

A COLLECTOR was in the habit of collecting by a private book, in which he made ticks against the sums received—

The Court held the book admissible in an action against his sureties, although the parties who made the payments were still living, and might have been called.

Receipt§.

See, also, tits. *Forgery—Payment—Stamp.*

principal was good (*Rex* v. *Folkes*, 1832, 1 Moo. C. C. 354). A count, charging A. with a rape as a principal in the first degree, and B. as principal in the second degree, may be joined with another count, charging B. as principal in the first degree, and A. as principal in the second degree. (*Rex* v. *Gray*, 1835, N. P., 7 C. & P. 164). Indictment for assault, with intent to abuse, and also with intent carnally &c., is divisible. (*Rex* v. *Dawson*, 1819, N. P., 3 Stark. 62).

* Semble, although the 9 Geo. 4, c. 31, s. 18, dispenses with proof of emission to constitute the crime of rape, it is not the less essential that the jury be satisfied from the circumstances that it took place. (Per *Taunton*, J.—*Rex* v. *Russell*, 1830, N. P., 2 M. & M. 122).

The criminal intent of the prisoner cannot be shewn by proof of former attempts; and the jury must be satisfied that he intended to complete the offence at all events, and notwithstanding any resistance. (*Rex* v. *Lloyd*, 1836, N. P., 7 C. & P. 318).

Where the offence was committed on a child alleged under ten years, held, that the best evidence of the age of the child ought to be produced, and that mere declarations of the grandmother, who might have been called, the mother being dead, were insufficient. (*Rex* v. *Wedge*, 1832, N. P., 5 C. & P. 298).

† Counsel can only examine generally whether the party made any complaint of the ill-treatment, leaving the particulars to be asked upon cross-examination, But, on the trial of an indictment for a rape, the prosecutrix may be asked whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent. (*Rex* v. *Martin*, 1834, N. P., 6 C. & P. 562).

‡ On an indictment containing two counts for an assault with intent to commit a rape, and for a common assault, the record of the finding of the jury was, that the defendant was "guilty of the said misdemeanour and offence in manner and form, &c.," and the Court adjudged him, "for the said misdemeanour," to be imprisoned, &c.:—Held, that the finding of the jury was in effect finding him guilty of the whole offence charged, and the term "misdemeanour" being nomen collectivum, the judgment was warranted by the verdict. (*Rex* v. *Powell*, H. T. 1831, K. B., 2 B. & Ad. 75).

§ A paper signed by the defendant was in the following form:—"Mr. H. (the plaintiff) has advanced me 12*l.* on furniture, &c., delivered to him at Stratford:"—Held, that this did not require a stamp. (*Huxley* v. *O'Connor*, M. T. 1837, N.P., 8 C. & P. 204). So, a paper containing a statement not offered in evidence

Receiver*.

Recognizance.

See tits. *Articles of the Peace—Bail—Replevin—Frauds, Statute of.*

I. RELATIVE TO WHAT IS A RECOGNIZANCE, p. 298.

II. RELATIVE TO ON WHOM BINDING, p. 298.

III. RELATIVE TO WHEN IT CAN BE ENFORCED, p. 298.

as a receipt, is admissible without a receipt stamp. (*Brookes* v. *Davis*, M.T. 1825, N. P., 2 C. & P. 186). A receipt for £——, which sum, together with £—— already received, is a satisfaction for all my claims for lost services, is not a receipt in full of all demands, but only of the sum mentioned. (*Dibden* v. *Morris*, T. T. 1825, N. P., 2 C. & P. 44).

* *As to husband and wife.*]—Where the charge of receiving stolen goods was joint against the husband and wife, and it had not been left to the jury to say whether she received them in the absence of the husband:—Held, that she could not be properly convicted, although she had taken a more active part than he had. (*Rex* v. *Archer*, 1826, 1 Moody, C. C. 146).

Indictment.]—Under 3 Geo. 4, c. 24, s. 3, a receiver may be indicted for felony, although the principal has not been convicted. (*Rex* v. *Solomons*, 1 Moo. C. C. 292, overruling *Rex* v. *Cale*, Id. 11). In an indictment for the substantive felony of receiving stolen goods, an allegation that the goods were stolen "by a certain evil disposed person" is good, without stating the name of the principal felon or averring that he is unknown. (*Rex* v. *Jervis*, 1833, N. P., 6 C. & P. 156). Three persons were charged with a larceny, and two others as accessaries, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods. The principals were acquitted:—Held, that the receivers might be convicted on the last two counts of the indictment. (*Reg.* v. *Pulham*, 1840, N. P., 9 C. & P. 280). On an indictment against a receiver for a misdemeanour under 3 Geo. 4, c, 24, s. 3:—Held, (per five Judges against four) that the statute left as misdemeanours what before the passing of it were misdemeanors, and that the offence was not therefore punishable as a felony. (*Rex* v. *Kale*, 1824, 1 Moo. C. C. 11). A person waiting outside of a house to receive goods which a confederate is stealing in the house, is a principal. (*Rex* v. *Owen*, 1825, 1 Moo. C. C. 96).

Evidence.]—On an indictment against a principal and receivers, the evidence being chiefly that of an accomplice, who was confirmed as to the receivers, but there was no confirmation as against the principal felon:—Held, that it was insufficient. (*Rex* v. *Wells*, 1829, N. P., 1 M. & M. 327). The possession of other goods of the prosecutor which have been stolen is admissible against a receiver, with the view to establish the scienter. (*Rex* v. *Davis*, 1833, N. P., 6 C. & P. 177). A. had agisted his horse with B., who lived fourteen miles from him, and in consequence of hearing of the loss of it, he went to the field of B., where it was not:—Held, to be not sufficient proof of loss to support an indictment for horse-stealing. (*Rex* v. *Vend*, 1833, N. P., 6 C. & 176).

Proceedings at the trial.]—On an indictment against two for stealing sheep, and two for receiving parts of the sheep stolen, the latter of whom only called witnesses:—Held, that the counsel for the prosecution, although entitled to the general reply, was bound to confine himself to the case of the party calling witnesses, the offences being separate, and the subject of distinct indictments. (*Reg.* v. *Hayes*, 1836, N. P., 2 M. & Rob. 155).

Acquittal.]—A prisoner charged with a substantive felony for receiving goods, of which the principals charged in the same indictment were afterwards acquitted:—Held, that the Court had no jurisdiction to discharge the former, being under sentence; the remedy was by writ of error, or application to the Secretary of State. (*Rex* v. *Palmer*, 1833, O. B., 6 C. & P. 122).

IV. RELATIVE TO SUSPENDING THE RECOGNIZANCE, p. 299.

V. RELATIVE TO THE DISCHARGE OF, p. 299.

VI. RELATIVE TO ESTREATING, p. 299.

VII. RELATIVE TO THE DECLARATION ON, p. 299.

VIII. RELATIVE TO SCIRE FACIAS ON, p. 299.

IX. RELATIVE TO MITIGATING THE PENALTY, p. 300.

X. RELATIVE TO COSTS, p. 300.

XI. RELATIVE TO STAYING PROCEEDINGS, p. 300.

XII. RELATIVE TO THE POWER OF THE SESSIONS, p. 300.

I. RELATIVE TO WHAT IS A RECOGNIZANCE.

REX *v.* DOVER (MAYOR OF), H. T. 1835. Ex. 1 *C., M. & R.* 726; S. C. 5 *Tyrw.* 279.

A recognizance is nothing more than a debt of record to the Crown.

A RECOGNIZANCE entered into by a party charged with a misdemeanour before the justices for the town and port of Dover, and estreated for non-appearance—

The Court held, not within the meaning of a grant of Edw. 4 to the corporation, of "all amerciaments, issues, and penalties *forfeited*, in whatsoever courts of his Majesty the barons and resiants should happen to be adjudged to make such fines, and to be amerced, and forfeit such issues, penalties, &c.;" nor within a charter of Car. 2, establishing Courts of record within the Cinque Ports, and granting fines, amerciaments, redemptions, issues and forfeitures, and other profits, &c.; a recognizance, in its proper sense, being nothing more than a debt of record to the Crown, defeasible in a particular event.

II. RELATIVE TO ON WHOM BINDING *.

III. RELATIVE TO WHEN IT CAN BE ENFORCED.

REX *v.* BINGHAM, H. T. 1829. Ex. 3 *Y. & J.* 101.

Recognizance cannot be en-

A. ENTERED into a recognizance to pay to the King a certain sum, or such sum as B. should award; and afterwards, by rule of

* An infant may be bound to appear and prosecute a criminal charge. (*Williams, Ex parte*, T. T. 1824, Ex., 1 M'Clel. 493).

Court, C. was, by consent of parties, substituted as arbitrator in lieu of B., and C. made his award. forced when the nature of the duty is changed.

The Court held, that the recognizance was not forfeited by the non-performance of the award of C., the nature of the duty being changed.

IV. RELATIVE TO SUSPENDING THE RECOGNIZANCE*.

V. RELATIVE TO THE DISCHARGE OF †.

VI. RELATIVE TO ESTREATING‡.

VII. RELATIVE TO THE DECLARATION ON.

MUNKENBACH *v.* BUCHNELL, E. T. 1835. C. P. 1 *Scott*, 569. The declaration must accurately describe the form of action.

IN an action on recognizance of bail the plaintiff alleged, that the recognizance was entered in an action of debt. Upon nul tiel record pleaded, and production of the record, the action was found to be in assumpsit, not debt.

The Court held this to be a fatal variance; but, upon a distinct motion being made with that object, gave the party leave to amend.

VIII. RELATIVE TO SCIRE FACIAS ON.

REX *v.* BULLOCK, E. T. 1836. Ex. 1 *Tyrw. & G.* 998; S. C. 1 *M. & W.* 726.

SCI. FA. upon a recognizance for payment of costs, occasioned by a claim to goods seized, in case they should be adjudged forfeited. The defendant, on a sci. fa., on

* Recognizances will only be suspended from term to term, though the party prosecuting be alleged to be in America. (*Thomas Clark, In re*, T. T. 1823, Ex., 11 Price, 730).

The Court of Exchequer has jurisdiction to respite process issued in respect of fines, &c., imposed upon presentments, &c., when estreated, but will only do so from term to term, and not further. (*Inhabitants of Norwich, In re*, 1823, Ex., 11 Price, 766; S. P. *Bennett, Ex parte*, T. T. 1823, Ex., 11 Price, 770).

† A recognizance refused to be discharged without notice to the Attorney-General, although the forfeiture accrued to the city of London. (*Morris, Ex parte*, T. T. 1836, Ex., 1 M. & W. 510; S. C. 1 Tyrw. & Gr. 805). And a motion to discharge a defendant from estreated recognizances under the 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the Treasury. (*Tipton, Ex parte*, M. T. 1834, Ex., 3 D. P. C. 177). And in order to obtain a discharge of a recognizance, there must be shewn a constat of the proceedings from the clerk of the estreats office. (*Dunk, Ex parte*, T. T. 1831, Ex., 2 Tyrw. 500).

Where a defendant entered into a recognizance to appear to and try an indictment for perjury against her in Trinity term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the Court would not, in Michaelmas term, discharge the recognizance, but ordered that it should not be put in suit before the last day of the term. (*Rex* v. *Grote*, M. T. 1834, Ex., 3 D. P. C. 255).

‡ The Court has no jurisdiction over estreats not returned into it, but the relief is within that of the quarter sessions only, under 3 Geo. 4, c. 46, s. 2. (*Rex* v. *Thompson*, H. T. 1832, Ex., 3 Tyrw. 53). And the Exchequer has no authority to interfere where the recognizance has not been estreated. (*Rex* v. *Hankins*, M. T. 1824, Ex., 1 M'Clel. & Y. 27).

a recognizance, must shew the conditions performed.

The Court held to be immaterial for whose benefit the recognizance was entered into; and it was for the defendant to shew the condition to have been performed.

IX. RELATIVE TO MITIGATING THE PENALTY.

HOOPER, *In re,* M. T. 1824. Ex. 1 *M'Clel.* 578.

Although excuse be not sufficient to save forfeiture, it may suffice to mitigate penalty.

ON motion to discharge the recognizance on an affidavit stating that the prisoners had committed the theft in the day-time, in a field where they were reaping; that one of them having been very young, and that they having been all admitted to bail, the petitioner had, on consideration, looked upon the matter, not as an offence committed with a felonious intent, but as a mere frolic, and had therefore not appeared to prosecute. The affidavit further stated, that the petitioner was not in good circumstances, and that he had paid the 40*l.* only to prevent the taking of his goods.

The Court were of opinion, that the grounds laid for discharging the recognizance were wholly insufficient, and refused the motion.—But, under such circumstances, they have power to mitigate the penalty.

X. RELATIVE TO COSTS*.

XI. RELATIVE TO STAYING PROCEEDINGS†.

XII. RELATIVE TO THE POWER OF THE SESSIONS.

REG. *v.* JUSTICES OF WEST RIDING OF YORKSHIRE, T. T. 1837. K. B. 2 *N. & P.* 457.

A recognizance taken at the sessions must be estreated in the superior Court.

A PARTY entered into a recognizance to keep the peace before a single justice, and was subsequently convicted of an assault before a petty sessions, and paid a fine.

The Court held, that the forfeiture of the recognizance not having taken place at the quarter sessions, that Court had no power to estreat it, the course being by removal into the superior Court, and proceeding by sci. fa.

HAYNES *v.* HAYTON, T. T. 1827. K. B. 7 *B. & C.* 293; *semb. overruling* S. C., N. P., 2 *C. & P.* 621.

After levy of amount of for-

ASSUMPSIT against the sheriff. By the stat. 3 Geo. 4, c. 46, the Court of Quarter Sessions are empowered to discharge a forfeited

* Where the conusor in sci. fa. succeeds on demurrer, and judgment is affirmed in error, he is not entitled to costs against the real prosecutor. (*Rex* in aid of *Hollis* v. *Bingham,* H. T. 1831, Ex., 1 Tyrw. 262; S. C. 1 C. & J. 379).

† The Court may stay proceedings in a forfeited recognizance on reasonable grounds. (*Fredlington, in re,* T. T. 1821, Ex., 9 Price, 658).

recognizance in those cases only where the party had been committed to gaol, or has given security to appear at the sessions; and, therefore, where a party whose recognizance had become forfeited for not appearing to an indictment, and against whom process had issued, paid to the sheriff the sum mentioned in the recognizance in order to prevent a sale of his goods, and the justices at sessions afterwards, by an order, mitigated the recognizance to a small sum, and directed the sheriff to discharge the residue from the recognizance—

feiture, and money paid to the sheriff, the sessions have no power to withdraw the amount, and order sheriff to return it to the party.

The Court held, that such order was void, and that the party was not entitled to recover from the sheriff the sum which the justices had ordered to be discharged.

Re-conbeyance*.

Record†. See, also, tit. *Nul tiel Record.*

* A tenant in tail makes a feoffment, but feoffee never enters nor obtains possession of the deed of feoffment or other muniments, which always remain in the possession of the feoffor. Feoffor dies seised, and is succeeded by his heir-at-law, who suffers a recovery of the lands in question, and enjoys the possession through his lessee for forty-six years:—Held, upon ejectment by the devisee of the heir-at-law of the feoffor, that a deed of re-conveyance from the feoffee to the feoffor may be presumed; consequently, that the heir of the latter was remitted to his old estate tail; that the recovery was valid, and the action well brought. (*Tenny* v. *Jones*, T. T. 1833, C. P., 10 Bing. 75).

† *When proceedings are to be entered on.*]—By Rule H. T. 4 Will. 4, it is ordered, "That the entry of proceedings on the record for trial, or on the judgment-roll, (according to the nature of the case), shall be taken to be and shall be in fact the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever."

Costs of proving, when allowed.]—By Rule H. T. 4 Will. 4, it is ordered, "That the expense of a witness called only to prove the copy of any judgment, writ, or other public document shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused to make such admission."

Re-passing record.]—By Rule H. T. 4 Will. 4, it is ordered, "That it shall not be necessary to re-pass any Nisi Prius record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to amend the day of the teste and return of the distringas or habeas corpus, or of the clause of Nisi Prius, the same may be done by the order of a Judge obtained on an application ex parte.

Trial by.]—Where blanks had been left out in the record at the time of passing it, and afterwards filled up without an order of the Judge:—Held, that he could try only in the state it came before him, and would make no order to relieve a party who had so acted without due authority. (*Tenterden*, L. C. J.—*Drummond* v. *Burt*, 1831, N. P., 2 M. & M. 136).

Recovery *.

I. RELATIVE TO THE THINGS OF WHICH IT MIGHT BE SUFFERED BEFORE 3 & 4 Will. 4, c. 74, p. 302.

II. RELATIVE TO THE ACKNOWLEDGMENT BEFORE THE 3 & 4 Will. 4, c. 74, p. 302.

III. RELATIVE TO THE TENANT TO THE PRÆCIPE BEFORE 3 & 4 Will. 4, c. 74, p. 303.

IV. RELATIVE TO THE VOUCHEE BEFORE 3 & 4 Will. 4, c. 74, p. 303.

V. RELATIVE TO THE WARRANT OF ATTORNEY AND APPEARANCE BEFORE 3 & 4 Will. 4, c. 74, p. 303.

VI. RELATIVE TO THE DEDIMUS AND EXEMPLIFICATION BEFORE 3 & 4 Will. 4, c. 74, p. 303.

VII. RELATIVE TO AMENDMENTS.

(*a*) Before 3 & 4 Will. 4, c. 74, p. 303.

(*b*) Since 3 & 4 Will. 4, c. 74, p. 303.

VIII. RELATIVE TO PROCEEDINGS ABROAD BEFORE 3 & 4 Will. 4, c. 74, AND IN WALES AND CHESTER UNDER 1 Will. 4, p. 304.

I. RELATIVE TO THE THINGS OF WHICH IT MIGHT BE SUFFERED BEFORE 3 & 4 Will. 4, c. 74†.

II. RELATIVE TO THE ACKNOWLEDGMENT BEFORE THE 3 & 4 Will. 4, c. 74‡.

* By 3 & 4 Will. 4, c. 74, recoveries are abolished, and the "assurance" substituted in lieu thereof. An analysis of the statute is given under tit. *Fines of Land*, ante, Vol. 4, p. 52. It has been deemed expedient only to refer to the leading cases on the subject passed before that statute.

† See *Cooke* dem., *Yates* ten., M. T. 1826, C. P., 4 Bing. 90; *Earl of Suffolk* dem., *Hill* ten., H. T. 1832, C. P., 1 M. & Scott, 55; *Hind* dem., *Rawdon* ten., M. T. 1832, C. P., 1 M. & Scott, 515; *Doe* d. *Smith* v. *Bird*, M. T. 1833, K. B., 2 N. & M. 679.

‡ *Tatten* dem., *Grey* ten., M. T. 1824, C. P., 2 Bing. 313; *Davies* dem., *Dawson* ten., H. T. 1831, C. P., 7 Bing. 149; *Newark* vouch., M. T. 1832, C. P., 9 Bing. 397; S. C. 2 M. & Scott, 562; S. C. 1 D. P. C. 710.

III. RELATIVE TO THE TENANT TO THE PRÆCIPE BEFORE 3 & 4 WILL. 4, c. 74*.

IV. RELATIVE TO THE VOUCHEE BEFORE THE 3 & 4 WILL. 4, c. 74†.

V. RELATIVE TO THE WARRANT OF ATTORNEY AND APPEARANCE BEFORE THE 3 & 4 WILL. 4, c. 74‡.

VI. RELATIVE TO THE DEDIMUS AND EXEMPLIFICATION BEFORE 3 & 4 WILL. 4, c. 74 §.

VII. RELATIVE TO AMENDMENTS.

(*a*) BEFORE 3 & 4 WILL. 4, c. 74 ||.

(*b*) SINCE 3 & 4 WILL. 4, c. 74.

TWISDEN, *In re*, H. T. 1837. C. P. 4 *Bing. N. S.* 253.

ON motion to amend a recovery—

Amendment allowed by inserting the words "right of free warren¶."

The Court allowed the amendment, by inserting "right of free warren," under 3 & 4 Will. 4, c. 74, s. 8, the right having always gone with the property, and the deed to lead the uses containing the word *hereditaments*.

* *Batterwell* dem., *Turner* ten., M. T. 1824, C. P., 9 Moore, 591.

† *Lenney* vouch., T. T. 1827, C. P., 4 Bing. 101; S. C. 12 Moore, 298; *Addis* dem., *Norris* ten., E. T. 1831, C. P., 7 Bing. 455.

‡ *Wallcott* vouch., H. T. 1826, C. P., 3 Bing. 423; *Bland* dem., *Fairbank* ten., H. T. 1827, C. P., 12 Moore, 65; *Hicks* dem., *Dean* ten., H. T. 1827, C. P., 12 Moore, 295; *Egar* ten., H. T. 1833, C. P., 2 M. & Scott, 777; *Sands* dem., *Jollis* ten., H. T. 1833, C. P., 2 M. & Scott, 777.

§ *As to the dedimus.*]—See *Connop* dem., *Addis* ten., 1824, C. P., 8 Moore, 274; *Carew* dem., *White* ten., T. T. 1828, C. P., 2 M. & P. 558; *Simmons* vouch., T. T. 1826, C. P., 11 Moore, 485; *Tanbridge* dem., *Joyes* ten., 6 Bing. 26.

As to the exemplification.]—See *Lenney* vouch., T. T. 1827, C. P., 12 Moore, 298; S. C. 4 Bing. 101.

|| See *Chambers* dem., *Blake* ten., 1824, C. P., 8 Moore, 586; *Oddie* dem., *Faker* ten., E. T. 1826, C. P., 3 Bing. 446; *Rogers* dem., *White* ten., M. T. 1824, C. P., 9 Moore, 740; *Holmes* dem., *Seton* ten., T. T. 1825, C. P., 10 Moore, 585; *King* dem., *Shepherd* ten., E. T. 1825, C. P., 10 Moore, 251; *Parish* dem., *Bonaseletti* ten., H. T. 1827, C. P., 12 Moore, 159; *Hamilton* dem., *Farrant* ten., M. T. 1831, C. P., 8 Bing. 10; S. C. 6 M. & P. 45; *Smith* dem., *Brodwick* ten., 10 Moore, 109; *Kinderley* dem., *Graham* ten., 11 Moore, 249; *Dansey* dem., *Lee* ten., M. T. 1830, C. P., 2 M. & Scott, 371.

¶ Where the deed to lead the uses is sufficient to cover all the lands intended to be passed, an application to amend the recovery, by inserting the name of a parish under the 3 & 4 Will. 4, c. 74, s. 8, (Fines and Recoveries Act), is unnecessary. (*Watkins, In re*, M. T. 1840, C. P., 9 D. P. C. 58).

Application to amend the warrant of attorney, only by transposing the names, refused. (*Lamont* vouch., H. T. 1834, C. P., 3 Bing. N. S. 297; S. C. 3 Scott, 666).

VIII. RELATIVE TO PROCEEDINGS ABROAD BEFORE 3 & 4 WILL. 4, c. 74*, AND IN WALES AND CHESTER UNDER 1 WILL. 4, c. 3†.

Recovery, former. See, ante, tit. *Judgment recovered.*

Re-entry. See tits. *Covenant—Ejectment—Landlord and Tenant.*

Registry Act, general, for Births, Deaths, and Marriages‡. See also 3 & 4 *Vict. c.* 92.

Registry of Ships. See tit. *Ship and Shipping.*

Rejoinder§. See tit. *Plea*—and particular heads according to subject-matter.

* See *Denn* and *Nicholas* vouchees, H. T. 1829, C. P., 3 M. & P. 28).

† See 1 Will. 4, c. 3, s. 5.

‡ The 6 & 7 Will. 4, c. 86, s. 20, makes it imperative on the parties named to give information to enable the registrar to make a registry of birth, upon his requesting it to be given, and an indictment lies against the party for refusing, although the child may have been already registered in the parish registry. (*Reg.* v. *Price*, H. T. 1840, Q. B., 11 A. & E. 727; S. C. 3 P. & D. 421). A register of baptism stating the time of birth is not evidence as to the latter fact. (*Rex* v. *Clapham*, T. T. 1829, N. P., 4 C. & P. 29).

§ The defendant need not rejoin until he has been ruled to rejoin, and rejoinder demanded, unless he is under terms to rejoin gratis; he must then rejoin without a rule. A rule to rejoin is a four-day rule, expiring exclusive of the day of service, and may be given at any time within sixteen days after term; but now in all special pleadings where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin. (H. T. 2 Will. 4). A twenty-four hours' demand of a rejoinder, however, is still necessary where the Rule H. T. 2 Will. 4 does not apply; and being under terms to rejoin gratis does not dispense with the demand. (*Seaton* v. *Skeay*, E. T. 1835, B. C. 3 D. P. C. 537).

Before that Rule rejoining gratis dispensed not only with rule to rejoin, but obliged defendant to rejoin within twenty-four hours after demand. (*Clarke* v. *Adams*, T. T. 1832, Ex., 2 C. & J. 683; S. C. 3 Tyrw. 755).

The Rule H. T. 4 Will. 4 orders, that in a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of precludi non, or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

Release.

I. RELATIVE TO THE STAMP, 305.

II. RELATIVE TO THE CONSTRUCTION OF, p. 305.

III. RELATIVE TO THE EFFECT OF, p. 306.

IV. RELATIVE TO THE PLEA OF, p. 306.

V. RELATIVE TO THE EVIDENCE, p. 306.

VI. RELATIVE TO SETTING ASIDE, p. 306.

I. RELATIVE TO THE STAMP.

SPICER *v.* BURGESS, T. T. 1834. Ex. 1 *C., M. & R.* 129; S. C. 4 *Tyrw.* 598.

A witness's release must be stamped.

A RELEASE of a witness, having been executed by the defendant, was given by him to his attorney. During the trial, it was altered by inserting the name of another witness and changing the terms, so as to make it a release of both witnesses, and was re-executed by the defendant before delivery to either witness.

The Court held, that the instrument was in fieri at the time of the second execution, and therefore that no new stamp was necessary.

II. RELATIVE TO THE CONSTRUCTION OF.

SIMMS *v.* JOHNSON, H. T. 1832. K. B. 3 *B. & Ad.* 175.

The general words may be qualified by the recital*.

A DEED of release recited that disputes and differences had arisen between the plaintiff and one of the defendants, and that actions at law had been brought by them against each other, which were then depending, and that it was agreed between them, that, in order to put an end thereto, the said defendant should pay to the said plaintiff 150*l.*, and that each of them should execute a release to the other. The release by the plaintiff was general.

The Court held, 1st, That it did not extend to causes of action existing between the plaintiff and the defendant jointly with other parties; and, 2ndly, that evidence was admissible to prove what were the disputes existing at the time, upon which the actions referred to in the recital were brought.

See 4 *M. & S.* 423; 2 *B. & B.* 38.

* Where, at the time of an agreement of reference of accounts entered into, the defendant also signed a cognovit for the arrears of an annuity on a bond, the arbitrator awarded mutual and general releases, which were executed:—Held, that the release did not extend to the bond, and that the general words of the release might be restrained by the recital. (*Upton* v. *Upton*, E. T. 1832, B. C., 1 D. P. C. 400).

III. RELATIVE TO THE EFFECT OF*.

IV. RELATIVE TO THE PLEA OF.

HERBERT *v.* PIGOTT, H. T. 1834. Ex. 2 *C. & M.* 384; S. C. 2 *D. P. C.* 392.

To set aside a plea of release by parties not joined, fraud must be established.

THIS action was brought by two out of four executors, and the defendant pleaded a release by the other two executors, given at their own suggestion, and without his interference. It was considered that the executors who had given the release ought to have been co-plaintiffs; and *Jones* v. *Herbert* (7 Taunt. 421) was relied on, which was, that a plaintiff who applies to set aside a release, given by a plaintiff, puis darrein continuance, must make out a very strong case of fraud.

The Court said, that no such case was established here.

V. RELATIVE TO THE EVIDENCE†.

VI. RELATIVE TO SETTING ASIDE‡.

BARKER *v.* RICHARDSON, E. T. 1827. Ex. 1 *Y. & J.* 362.

A release obtained fraudulently from one

THERE were several plaintiffs, and one fraudulently gave a release to prejudice the real plaintiff, and that release was pleaded. On motion to set the plea aside—

* A release of the principal applies to the interest. (*Harding* v. *Ambler*, H. T. 1838, Ex., 3 M. & W. 279). In an action by a landlord against a sheriff for removing, under an execution, the goods of his tenant, without securing the payment of a year's rent, as required by the stat. 8 Ann. c. 14, the tenant was called to prove the rent due, and objected to as interested, and released by the landlord:—Held, that this release could not be pleaded in bar of the action puis darrein continuance, nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only. The stat. 8 Ann. c. 14, s. 1, applies to goods in apartments being parcel of a messuage. (*Thurgood* v. *Richardson*, H. T. 1831, N. P., 4 C. & P. 481).

† The plaintiff, an obligee in a bond, given by two obligors, executed a release to one, and having brought an action on the bond against the defendant, the co-obligor, he pleaded such release in bar; the plaintiff replied that the release was given with an undertaking on the part of the defendant, that such release should not operate in his discharge; and on demurrer—Held, that the plaintiff could not by a parol averment vary the instrument under seal, which, being the release of an entire demand, would operate as a release to the defendant. (*Cocks* v. *Nash*, M. T. 1832, C. P., 9 Bing. 341; S. C. 2 M. & Scott, 434. See 5 Co. Rep. 26; 5 B. & Ald. 187).

‡ Release given in breach of trust ordered after plea to be delivered up, and plea set aside. (*Manning* v. *Fox*, T. T. 1822, C. P., 7 Moore, 617).

Where one of several plaintiffs, assignees of a bank, releases the cause of action, and the release is pleaded, the Court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff who had given the release against costs. (*Johnson* v. *Holdsworth*, T. T. 1835, B. C., 4 D. P. C. 63). Where the affidavits in support of the application to set aside a release, given by a co-plaintiff, do not clearly shew fraud, the Court will not interfere summarily to set it aside. (*Crook* v. *Stephens*, H. T. 1839, C. P., 5 Bing. N. S. 688; S. C. 7 Scott, 848). But the Court will not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the re-

Per Cur.—The Courts have exercised the jurisdiction sought to be enforced in this case on several occasions since the case of *Payne* v. *Rogers*, (1 B. & P. 447), in which the Court set aside a release given by a tenant, in whose name the landlord had instituted proceedings for an encroachment on his common. It is clear that, if two partners commence an action, one may release the subject-matter of it; and that if there be no fraud to induce the Court to interfere and set aside that release, it will be binding upon the other plaintiff, and operate as a bar to the action.

of several plaintiffs will, when pleaded, be set aside.

Remainder*. See tits. *Reversion—Will.*

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leasor is not a ground for setting aside the plea, since that may be replied. (*Wild* v. *Williams*, E. T. 1840, Ex., 6 M. & W. 490).

* Where a testator bequeathed the whole of his estate, real and personal, to his executors, with powers to receive rents, to mortgage for the purpose of paying fines, and to invest accumulations in new purchases, in trust that his daughter, until twenty-one, should receive, if sole and unmarried, an annuity of 860*l.*, and upon attaining thirty-one, if unmarried, a further annuity of 40*l.*, with a proviso that the trustees might apply any sums beyond for her maintenance and advantage, so long as she was unmarried, but not otherwise, and so as not to exceed the annual rents and profits; there was a further proviso, that in case his daughter should marry without consent of the trustees, she should be paid only an annuity for life of 50*l.*, and the estate be held in trust for her children as tenants in common in tail, and for default of such issue, then over to the testator's sister; but if the daughter married with consent, then to settle the estates upon the daughter and her husband for their joint lives, with remainder to the issue, in such shares as the trustees should appoint, or otherwise as in the will limited. The daughter married with consent, but died without issue:—Held, (reversing a former decision), that the remainder to the sister failed. (*Tolderoy* v. *Colt*, E. T. 1836, Ex., 1 M. & W. 250; S. C. 1 Tyrw. & G. 324).

Testator devised to his daughter for life, remainder to her husband for life, if he should survive her, remainder to her son J. in fee; but in case he should die in his (the testator's) daughter's lifetime, and she should have no other child living at her death, that then she should give and devise it as she should think proper. The daughter had afterwards another son, W., and survived her husband. J., the eldest son, died shortly after the testator, in his mother's lifetime, after which she levied a fine with proclamations, and conveyed away the premises:—Held, that at the death of the testator, and until the death of J., the limitation to the testator's daughter could avail only as an executory devise; but that upon the death of J. it became a contingent remander, and was destroyed by the fine. (*Doe* d. *Harris* v. *Howell*, M. T. 1829, K. B., 10 B. & C. 191). But where devise to N. and Mary, his wife, and the survivor of them, for life, and then to M., their daughter, or, if more children by the said wife, equally between them, and, "in case they have no children," to them in fee:—Held, that those words were to be construed, if they or the survivor of them left no such child living when the particular estate determined, and the last remainder therefore only vested upon the death of the surviving parent, leaving no children of the marriage. (*Doe* d. *Nesmyth* v. *Knowles*, T. T. 1830, K. B., 1 B. & Ad. 325). A right of entry as trustees sufficient to support a contingent remainder. (*Davies* v. *Bush*, H. T. 1825, Ex., 1 M'Clel. & Y. 88).

Where A., the father, was seised of one moiety of a copyhold for life, remainder to his daughter B. in tail, remainder to A. in fee; B. being married, and having issue five children, became seised also of the other moiety in fee on her mother's death, who had covenanted to settle it in the same way as the other, but had died without doing so; B. afterwards, in pursuance of such covenant, surrendered her moiety, and thereby both moieties became settled in A. for life, remainder to B. in tail, remainder to A. in fee; and on the same day A. and B. surrendered the entirety, for the purposes of suffering a recovery, which was done, and the uses deeclared to be to A. for life, remainder to B. for life, remainder to the heirs of the survivor. On the same day, A., in pursuance of his covenant in his

Remanet*

Removal of Causes†. See tits. *Certiorari—Habeas Corpus—Replevin.*

Rent.

See, also, tit. *Landlord and Tenant.*

I. RELATIVE TO RENT-CHARGE, p. 308.

II. RELATIVE TO WHO LIABLE FOR, p. 309.

III. RELATIVE TO WHEN PAYABLE, p. 310.

IV. RELATIVE TO APPORTIONMENT, p. 310.

V. RELATIVE TO THE SATISFACTION OF, p. 310.

VI. RELATIVE TO MORTGAGEE'S RIGHT, p. 310.

VII. RELATIVE TO PLEADINGS AND EVIDENCE, p. 311.

VIII. RELATIVE TO STAYING PROCEEDINGS, p. 311.

I. RELATIVE TO RENT-CHARGE.

SAFFERY *v.* ELGOOD, E. T. 1834. K. B. 3 *N. & M.* 346; S. C. 1 *Ad. & E.* 191.

A tenant for life may grant

THE defendants made cognizance of taking the goods by a distress for arrears of a rent-charge, granted by a tenant for sixty-two

daughter's marriage settlement, surrendered a moiety to trustees in trust for the husband of B. for life, remainder to B. for life, remainder to B.'s children in tail successively, remainder to the heirs of B., with powers to sell, exchange, and vary the uses, &c. In 1778, A. and B. and her husband surrendered one moiety to L., and the trustees, at the instance of B. and her husband, surrendered the other moiety to L. in fee, who ever since continued in possession. A. died in 1802, and B. in 1835, when the lessor of plaintiff claimed as heir:—Held, 1st, that claiming the contingent remainder as heir, he might bring ejectment before admittance; 2ndly, that the uses of the recovery in 1778 creating such contingent remainder, as being voluntary, were void, under 27 Eliz. c. 4, against a purchaser for a valuable consideration, the plain intention of such consideration being to make an effectual sale to L. (*Doe* v. *Rolfe*, M. T. 1838, K. B., 3. N. & P. 698).

* Where a cause is made a remanet, it is sufficient if the jury process is resealed; and no Judge's order is necessary for amending the day of the teste and return of the distringas. (*Wells* v. *Day*, T. T. 1838, Q. B., 8 Ad. & E. 941).

† From Chester and Wales, see 11 Geo. 4 & 1 Will. 4, c. 70.

Rule to declare on.]—By Rule H. T. 2 Will. 4, it is ordered, "That where a cause has been removed from an inferior Court, the rule to declare may be given within four days after the end of the term on which the writ is returned."

years, for three lives. Demurrer, that the grant of the rent-charge for lives, by a tenant for years, was void. This being granted by a termor for lives, and not for years determinable upon lives, is the grant of a greater estate than the termor had; and, although it might operate by way of estoppel as against the grantor, or those who are privy in estate with him, it will not operate against strangers.

a rent-charge for life.

Per Cur.—The grant is good for the term for which the termor could grant it.

II. RELATIVE TO WHO LIABLE FOR.

HOLMES *v.* LOVE, T. T. 1824. K. B. 3 *B. & C.* 242; S. C. 5 *D. & R.* 56.

IN an action for use and occupation, it appeared that the tenant assigned all his interest in the premises and other effects to trustees for the benefit of his creditors, but continued to reside and carry on the farm; and the deed contained a proviso that it should be void if all the creditors whose debts amounted to more than 5*l.* "should refuse to execute or otherwise consent to the deed within six months."

The trustees under a composition deed, who take an assignment of the premises, are liable for the rent, though the debtor occupies.

The Court held, that, in order to make it void, it was necessary to prove an actual refusal to execute or assent to the deed, and the defendants having, therefore, the legal interest vested in them, they were thereby, for want of such proofs, liable to the landlord for use and occupation.

BUCKWORTH *v.* SIMPSON, H. T. 1835. Ex. 1 *C., M. & R.* 834; S. C. 5 *Tyrw.* 344.

A. DEMISED to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands, and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and pay rent.

So an executor, who enters after the death, and pays rent, is liable, until he ends the tenancy, de bonis propriis.

The Court held, that the defendants having, as executors, entered and occupied the premises upon the death of the original lessee, and paid rent, and given no notice to determine the tenancy, they were by implication of law bound by the terms of the original contract, and liable de bonis propriis.

HORNIDGE *v.* WILSON, H. T. 1840. Q. B. 11 *Ad. & E.* 645; S. C. 3 *P. & D.* 641.

IN debt for rent by the lessee of the reversion, against an assignee of a term; plea, that he was administrator; that the premises were of less value than the rent, and payment over of all the profit that he received therefrom; and that before any rent was due he offered to surrender: also a plea of plene administravit. It appearing that the defendant's testator had under-let the premises, but the defendant had not been able to get in the rent, and that the premises were out of repair, although the lease contained a covenant for repair—

But an administrator is not liable for rent if the premises be of no value, and no assets.

The Court held, that, if the plea had been proved, it would have been an answer. But that the plea was not sufficiently supported to bar the defendant's liability.

III. RELATIVE TO WHEN PAYABLE.

HOPKINS *v.* HELMERE, T. T. 1838. Q. B. 3 *N. & P.* 452.

If the first quarter be payable in advance, the inference is that the subsequent rent is to be paid in the same way*.

BY indenture, dated March, 1828, A. demised to B., habendum from the 25th of March, for the term of seven years thence ensuing, wanting seven days, yielding yearly and every year during the said term the yearly rent of 285*l.*, by four equal quarterly payments, on the 25th of March, the 24th of June, &c., in every year, commencing from the said 25th of March then inst. There was a covenant to pay the said yearly sum on the said days appointed for payment.

The Court held, that the lessor was entitled to recover the rent for the last quarter of the seventh year, though it was not complete until the term had expired, the rent in fact being payable in advance.

IV. RELATIVE TO THE APPORTIONMENT†.

V. RELATIVE TO THE SATISFACTION OF.

ROYSTON *v.* HANKEY, M. T. 1832. C. P. 2 *M. & Scott,* 381.

A statement by a deceased, that his tenant, with whom he lives, shall have all he has, may be construed into a gift of the rent.

THE intestate had long lived with the defendant, and owed her for five years' rent, and it was proved that some time before his death he had said that she should have what property he had on the premises for what he owed, and the jury found a verdict for the defendant.

The Court held, that there was a sufficient delivery if the jury believed the witness as to the declaration, and refused to disturb the verdict.

VI. RELATIVE TO THE MORTGAGEE'S RIGHT TO‡. See, also, tit. *Mortgage.*

* If, by a written agreement, A. agrees to let, and B. to take a messuage from a day past, for a term of ten years, "at and under the rent of 80*l.*," this is an agreement by B. to pay a rent of 80*l.*; and, therefore, if there be a power of re-entry in case of a breach of any of the agreements therein contained, A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent. (*Doe* d. *Rains* v. *Kneller,* T. T. 1829, N. P., 4 C. & P. 3).

† Where the conveyance of the reversion of premises on lease released all the party's interest—Held, that parol evidence as to the apportionment of the current quarter's rent was inadmissible. (*Flinn* v. *Calon,* M. T. 1840, C. P., 1 M. & Gr. 589).

‡ A notice by the assignees of a mortgage to the tenant in possession of the transfer of the mortgage to them, and requiring him to pay them the future rents, operates as a demise from year to year, and the assignees cannot enter upon such tenant without giving him a regular notice to quit. (*Brown* v. *Storey,* E. T. 1840, C. P., 1 M. & Gr. 116; S. C. 1 Scott, 419).

VII. RELATIVE TO PLEADINGS AND EVIDENCE.

FAREWELL *v.* DICKENSON, H. T. 1827. K. B. 6 *B. & C.* 251.

DEBT for rent. The declaration averred a demise of "a messuage, land, and premises, with the appurtenants." The evidence shewed a demise of "a messuage or tenement, stable and outbuildings, with the cottage, garden, land, together with the furniture, utensils, and implements."

Bayley, B., who tried the cause, held this to be a fatal variance; but—

Per Cur.—The rent issues out of the real property, though other things may pass in the demise; there is no variance.

A declaration for rent for a messuage is supported by proof of an agreement for a messuage, together with furniture, utensils, &c.

CURTIS *v.* SPILLY, E. T. 1835. C. P. 1 *Bing. N. S.* 756.

IN an action of debt for rent against defendant, as assignee of all right, interest, &c., in the premises originally demised; upon proof that defendant was assignee but of part, and issue found accordingly—

The Court held, that the defendant was entitled to have the verdict entered for him.

So, an allegation, that *all* the estate, &c., came &c., is proved, though only *part* &c. came &c.

VIII. RELATIVE TO STAY OF PROCEEDINGS.

JONES *v.* WINKFIELD, T. T. 1834. C. P. 10 *Bing.* 308.

UPON the demise of premises and machinery at a certain rent, it was stipulated that the defendants might retain the rent, or any part, upon giving a bond to pay it, with interest, at the end of the term; and the rent being unpaid, and no bond given—

The Court held, that the lessor might maintain the action for the arrears, and refused to stay proceedings on tendering the bond.

Where rent is to be paid, or a bond given, and the bond is not given, the Court will not stay proceedings.

Repairs.

See tits. *Covenant—Landlord and Tenant.*

BOYLE *v.* TAMLYN, H. T. 1827. K. B. 6 *B. & C.* 329.

THE owner of a close, divided from an adjoining close by a fence, endeavoured to cast upon the owner of that adjoining close the burthen of repairing the fence. This he sought to do by evidence, that the owners and occupiers of that close had repaired the fence as far back in point of date as living memory could carry it. From this he wished the jury to be allowed to draw the presumption of a liability to repair. But it appearing, that, about thirty years before, both closes had been the freehold of one person—

The Court held, that the presumption could not be allowed; because, even supposing that there had been anciently an obligation

Between owners of adjoining properties, there is no presumption as to liability to repair.

in the owner of one close to repair the fence, that obligation had become merged in the unity of seisin in the two closes, and could only be revived by deed, which, if it really existed, ought to have been produced in evidence.

Repleader. See particular heads, according to subject-matter.

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I. RELATIVE TO WHEN IT LIES.

SABOURIN *v.* MARSHALL, E. T. 1832. K. B. 3 *B. & Ad.* 440.

Action of replevin may be maintained in case of seizure under poor-rate*.

BY the 43 Eliz. c. 2, giving the power of levying poor-rates by distress, and the power to replevy goods unlawfully distrained, it must be intended that the party might replevy by any mode then known by law, whether by writ or plaint, only that the issue in any such action should be tried by a jury, and not by wager of law.

The Court held, therefore, that replevin by plaint lies in case of a poor-rate, and that the sheriff is bound to replevy.

II. RELATIVE TO WHO MAY REPLEVY†.

III. RELATIVE TO THE TITLE.

COOPER *v.* BLUNDY, T. T. 1834. C. P. 1 *Bing. N. S.* 45; S. C. 4 *M. & Scott*, 562.

The payment of rent is an admission of title‡;

IN replevin it appeared that the plaintiff was admitted into possession of premises by the then occupier, who, as well as his predecessor, paid rent to the defendant under a distress.

The Court held, that, under such circumstances, it was not competent for the plaintiff to dispute the defendant's title, though the

* In *George* v. *Chambers*, T. T. 1843, MS., the Court of Exchequer held, that replevin lies in all cases where the goods of a party have been wrongfully taken. But it will not lie where the proper remedy is by appeal to the sessions. (*Marshall* v. *Pitman*, H. T. 1833, C. P., 9 Bing. 595; S. C. 2 M. & Scott, 745).

† Where the plaintiff in replevin, a married woman, her husband living abroad, took the premises of A., who afterwards sold them to F., and both claimed the rent coming due; she paid to A. and replevied the distress by F.:—Held, that the Court could not, without the defendant's consent, amend the proceedings by inserting the husband's name, unless the defendant would withdraw his plea and avow, the plaintiff being restrained from pleading her coverture. (*Eribouke* v. *Ciren*, M. T. 1836, K. B., 5 Ad. & E. 298).

‡ A., wishing to take stables, desired B. to go to the landlord and take them for him, it being agreed that when taken A. should underlet one of the stables to B. by the week; B. took the stables of the landlord in his own name, under a written agreement, but A. occupied all but the one which was underlet by A. to B., and B. for several weeks paid A. the weekly rent:—Held, that in the original

plaintiff's predecessors held under a lease for a certain term, to which the plaintiff was a stranger; and the defendant did not shew that he was the assignee of the reversion, but, on the contrary gave evidence tending to impeach the validity of the lease.

DANCER *v.* HASTINGS, M. T. 1826. C. P. 4 *Bing.* 2.

although merely to a receiver.

A RECEIVER appointed by the Court of Chancery demised premises, and described himself in the lease as such receiver, reserving the rent to himself or to the future receiver or receivers.

The Court held, that he was entitled to distrain for rent, although it was not objected that the legal estate was not vested in him, but the party who was entitled to the reversion.

IV. RELATIVE TO THE BOND, AND HEREIN OF THE SHERIFF AS CONNECTED WITH.

(*a*) OF THE BOND.

1. *Form of**.

2. *Of the Sureties.*

HUCKER *v.* GORDON, M. T. 1832. Ex. 1 *C. & M.* 58; S. C. 1 *Tyrw.* 107.

In replevin of distress damage feasant one surety sufficesf.

IN REPLEVIN—

The Court held, that the sheriff, in replevin for damage feasant, is not bound to take more than one surety, and the declaration

taking of them B. was a mere trustee for A., and that it was not necessary that B. should have assigned his interest by writing under the 3rd section of the Statute of Frauds, and that A. was therefore entitled to distrain on B. if the weekly rent was in arrear. (*Clark* v. *Waterlow*, H. T. 1838, N. P., 8 C. & P. 365; S. C. 2 M. & Rob. 87).

* The declaration alleged that a plaint having been made before one of the sheriffs of the city of London, he granted replevin, and took and assigned a bond, conditioned in the usual way, in his own name only:—Held, upon demurrer, that the allegation was sufficient, and that one of the two sheriffs might so act under the Statute of Marlbridge (52 Hen. 3, c. 21) and 11 Geo. 2, c. 19, s. 53. (*Thompson* v. *Farden*, T. T. 1840, C. P., 8 D. P. C. 813; 1 Scott, 275; S. C. 1 M. & G. 537).

† Where parties tender themselves as obligors in a replevin bond, the sheriff should require evidence of their reputed credit and solvency, and should not rest satisfied with their own representation, even upon oath. (*Jeffery* v. *Bastard*, E. T. 1836, K. B., 6 N. & M. 303; S. C. 4 Ad. & E. 823).

The Court refused to stay proceedings against the sheriff for having taken insufficient pledges in replevin, on the ground of the replevin suit having been referred without consent of the sureties. (*Dale* v. *Gordon*, M. T. 1832, C. P., 2 M. & Scott, 532).

The sureties in a replevin bond are only liable for the value of the goods seized and double costs; and if that value exceeds the amount of rent due, they will only be liable for the rent. (*Hunt* v. *Round*, T. T. 1834, B. C., 2 D. P. C. 558). But in case against the sheriff for taking insufficient sureties in replevin:—Held, that he was liable to the extent of the penalty of the bond given by them, and not merely of the value of the goods distrained. (*Paul* v. *Goodluck*, M. T. 1835, C. P., 2 Bing. N. S. 220). In an action against the sheriff for taking insufficient sureties, he is not liable for an action against sureties which failed. (*Baker* v. *Garrat*, E. T. 1825, C. P., 3 Bing. 56; see *Evans* v. *Brander*, 2 H. Bl. 547). Where the parties to a replevin suit agreed to refer, and that the replevin bond should stand as a security for the sum found to be due, without the privity of sureties:

for taking insufficient pledge must allege a writ de retorno habendo; it is not his duty to restore the goods, but only to take pledge, and the plaintiff ought to sue out the de retorno habendo; a count, therefore, merely for not restoring the goods, held bad.

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3. *Breach of the Condition.*

HARRISON *v.* WARDLE, M. T. 1833. K. B. 2 *N.* & *M.* 703; S. C. 5 *Ad.* & *E.* 146.

Not using due diligence is a breach of the condition*.

IN an action on a replevin bond, for not prosecuting the suit with effect and without delay, the pleas alleged that by the re. fa. lo. the sheriff was commanded to prefix the return day to the plaint, which the sheriff returned, amongst other things, that he had done, but that the plaintiff did not appear. A second plea stated also that the sheriff had summoned the now plaintiff to appear in the King's Bench to proceed on the plaint, who did not appear.

The Court held, that it was equally a breach of the bond if the plaintiff in replevin does not use due diligence in prosecuting the suit, even although it may appear that the suit is determined.

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4. *Pleadings and Evidence*†.

ALDRIDGE *v.* HOOPER, T. T. 1833. C. P. 10 *Bing.* 118.

A surety cannot plead that matters were referred to arbitration without his knowledge.

IN an action brought against the surety in a replevin bond, on breach by the principal, plea, that the plaintiff in replevin, and the party by whom the distress was made, had referred the cause to arbitration, without his (the surety's) privity or knowledge—

The Court held, that the statement of such reference in a plea has not the effect of discharging the surety. Semble, such a statement would have the effect of discharging the surety in equity, or upon an application to the equitable jurisdiction of the Court.

DUNN *v.* LOWE, E. T. 1827. C. P. 4 *Bing.* 193; S. C. 12 *Moore*, 407.

Not necessary under 11 Geo. 2, c. 19, s. 23, that the valuation should be ascertained by officers in writing.

ON a replevin bond, taken by the sheriff under the 11 Geo. 2, c. 19, s. 23, the following memorandum was written:—"W. G. maketh oath and saith, that the goods and chattels mentioned in and referred to by this bond are of the full value of 49*l.* 16*s.*, and no more, according to the best of his, deponent's, skill and judgment."

By the Court.—This question arises on the 23 sect. of the 11 Geo. 2, c. 19, which enacts, "That officers having authority to grant replevins shall take a bond in double the value of the goods distrained, such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress."

—Held, that they were discharged, having lost the right to compel the tenant to prosecute his suit speedily, and without delay. (*Archer* v. *Hall*, M.T. 1827, C. P., 4 Bing. 464; S. C. 1 M. & P. 285; see 3 Price, 214; 6 Taunt, 379, 7 Id. 97.)

* Allowing two years to elapse without taking any step in the cause is a breach of the condition. (*Oxford* v. *Perrett*, M. T. 1827, C. P., 4 Bing. 586).

† The assignee of a replevin bond is not obliged to sue in the Court into which the plaint has been removed by re. fa. lo. (*Wilson* v. *Hartly*, T. T. 1839, Ex., 7 D. P. C. 461).

There is nothing in the act requiring any affidavit in writing. The writing here does not amount to an affidavit; it is no more than a minute of the fact of the broker being sworn.

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5. *Staying Proceedings*.*

(*b*) Of the sheriff, and liability and jurisdiction of.

Harrison *v.* Wardle, M. T. 1833. K. B. 2 *N. & M.* 703; S. C. 5 *Ad. & E.* 146.

The defendant is not responsible for the neglect of the sheriff.

In replevin—

The Court held, that, the writ of re. fa. lo. in effect containing a declaration to summon the parties, the defendant was not responsible for the default of the sheriff, or guilty of delay in the suit, if the sheriff neglected to serve the summons.

Perreau *v.* Bevan, H. T. 1826. K. B. 5 *B. & C.* 284; S. C. 7 *D. & R.* 709.

In action against sheriff for losing a bond, the statement as to who presided in the court at the time the plaint was levied is immaterial†.

Declaration stated that the plaintiff distrained certain goods for 97*l.* 10*s.* rent; that the tenant made his plaint to the defendant, then being sheriff of the county of C., praying that the goods might be replevied; and thereupon the defendant, being sheriff, took a replevin bond from the tenant; and after reciting that it was the duty of the defendant, as sheriff, to take care of the replevin bond, the present declaration alleged that the tenant did not make a return of the goods according to the condition of the writing obligatory;

* The Court stayed proceedings on a bond upon payment into Court of the value of the goods ascertained by the Master. (*Gingell* v. *Turnbull*, M. T. 1838, C. P., 3 Bing. N. S. 881).

† The third count, after stating the plaint and its removal, and proceedings above, with the bond conditioned for the appearance of the tenant, and his prosecuting his suit with effect, averred the judgment that the tenant should take nothing by his writ, but be in mercy &c., with an award of a return of the goods, that the tenant did not make a return, whereby the bond became forfeited, and the defendant's breach of duty in losing the bond, whereby plaintiff was damnified; and it was objected at the trial, first, that the action was not maintainable, as the replevin bond could not have been enforced upon the judgment for want of a writ de retorno habendo being awarded, and return of elongata thereon; and, secondly, that the avowant, having elected to proceed under 17 Car. 2, c. 7, was confined to his execution under that statute:—Held, that the not having prosecuted the suit with success was a breach within the meaning of the words "prosecuting with effect," and the plaintiff would have been entitled to recover in respect thereof, if the bond had been assigned without any writ de retorno habendo having been issued, although a breach in that respect had not been formally assigned:—Held, also, that although it appeared that the jury had proceeded to inquire into the arrears and value of the distress according to the 17 Car. 2, and there had been a judgment according thereto, as well as the common-law judgment; yet, that the plaintiff, having elected to proceed under that statute, was not confined to his execution under it, but might also have proceeded against the sheriff for the damage occasioned by his negligence in losing it. (*Perreau* v. *Bevan*, H. T. 1826, K. B., 5 B. & C. 284; S. C. 7 D. & R. 709). In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff has assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution of the sureties, though averred in the declaration. (*Barnes* v. *Lucas*, T. T. 1825, N. P., 1 R. & M. 264). In actions for taking insufficient sureties, the question for the jury is, whether the officer had conducted himself with proper caution. (*Sutton* v. *Waite*, T. T. 1822, C. P., 7 Moore, 27; see 5 Taunt. 225). Where a lord of a

but therein made default, whereby the bond became forfeited. Breach, that the defendant lost the bond, whereby the plaintiff was damnified. At the trial, it appeared, that in December 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff:—Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied; and that had been proved by the record of the judgment in the replevin suit:—Held also, that although the plaintiff had elected to proceed under the stat. 17 Car. 2, c. 7, still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

V. RELATIVE TO REMOVING THE CAUSE OUT OF INFERIOR COURTS.

EDWARDS *v.* BOWEN, H. T. 1826. Q. B. 5 *B. & C.* 206.

A plaint in a county court in Wales is not removable by certiorari*.

ON a rule to quash a writ of certiorari and return, whereby a plaint in replevin had been removed into this Court from the county court of Carmarthen, upon an affidavit stating that no cause had been shewn to the Court for the issuing of such writ—

Per Cur.—The proper course would have been to remove the plaint by re. fa. lo. into the Court of Great Sessions, and then upon sufficient grounds the certiorari would issue to remove it thence into this Court.

VI. RELATIVE TO THE PLEADINGS.

(*a*) DECLARATION†.

(*b*) AVOWRIES‡.

manor had a prescriptive right to grant replevins in the manor, held that the sheriff could not replevy within it, the lord not having made default, or refused to act. (*Mounsey* v. *Dawson*, T. T. 1837, K. B., 1 N. & P. 763).

* In a sheriff's return to a writ of re. fa. lo., he must state positively whether any plaint is pending or not, and must not return the proceedings which have taken place before him in his court, leaving it to the Court to determine the question, whether the plaint is binding or not. (*Wright* v. *Lewis*, E. T. 1840, B. C., 8 D. P. C. 514). If a writ of pone per vadios is made returnable in vacation, instead of term, although by mistake, the Court will set it aside. (*Wright* v. *Lewis*, M. T. 1840, Q. B , 9 D. P. C. 183).

† Although, where the plaintiff in replevin omits to name the particular place in the declaration, the defect may be cured by verdict, or pleading over; yet, where the declaration alleged the taking to be in the parish of &c. "in a certain close there," held bad on special demurrer, but leave given to amend; when the close has no name it should be described by abuttals, or as in the occupation of &c. (*Patten* v. *Brodley*, E. T. 1828, C. P., 2 M. & P. 78).

‡ By Rule H. T. 4 Will. 4, pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the Rule), are not to be allowed. An avowry for taking cattle damage feasant in the locus, the soil of A., and another laying it as the soil of B. :—Held allowable under Reg. Gen. H. T. 4 Will. 4. (*Evans* v. *Lucas*, T. T. 1838, Q. B., 3 N. & P. 464).

BANKS *v.* ANGELL, H. T. 1838. Q. B. 3 *N. & P.* 94.

The avowry must state that the defendant was seised of the lands &c. under 21 Hen. 8, or should shew a privity under 11 Geo. 2 between distrainer and the tenant*.

DEFENDANT avowed in replevin, because a certain person, to him unknown at the time, when &c., held and enjoyed the lands as tenant to him and by virtue of a demise theretofore, made by J. A. to W. W. for a term of years, which term had vested in the said person unknown, and because the rent was in arrear the defendant distrained.

Per Cur.—It appears to us that this avowry cannot be sustained. It is not according to the 21 Hen. 8, c. 19, because it is not stated to have been within the fee or seignory of the avowant, nor holden of him. Neither is it according to the 11 Geo. 2, c. 19, s. 22. So far from stating generally that the defendant had demised to the plaintiff, it states that some one else had demised to some person unknown.

SMITH *v.* WALTON, H. T. 1832. C. P. 8 *Bing.* 235; S. C. 6 *M. & Scott*, 380.

Avowry, describing rent as due at Martinmas, must be taken as meaning new Martinmas.

ACTION of replevin for goods. Avowry and cognizance, that Smith occupied the house, in which &c., for a year and a half next before and ending at Martinmas, 1830, to wit, on the 23rd of November, 1830, as tenant thereof to Walton, under and by virtue of a certain demise thereof to him made, at and under the yearly rent of 3*l.* 10*s.*, payable half-yearly, that is to say, at Whitsuntide and Martinmas in every year, &c., &c., because &c.

The Court held, that, where a party pleads upon a record a taking from Martinmas, he cannot shew by extrinsic evidence that he meant Martinmas old style; and subsequent words, to wit, "the 23rd of November," will not be construed as explaining that Martinmas old style was intended.

HARGRAVE *v.* SHERWIN, M. T. 1826. K. B. 6 *B. & C.* 34.

An avowry, justifying the taking for rent due of four closes, is supported by evidence of a demise of six closes.

IN replevin for taking plaintiff's corn in four closes; avowry for rent arrear, stating that plaintiff held the closes, in which &c., at and under a certain yearly rent; plea in bar, non tenuit modo et formâ. It appeared in evidence, that the tenant held the four closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry.

Per Cur.—Each part of the land is liable to the whole rent, the defendants might, therefore, properly say, that the closes in which the distress was taken were held under the whole rent payable for the six closes.

* In replevin against the assignee of the reversion of part of the premises in respect of which the rent accrued:—Held, that the defendant may avow generally, and, stating the special facts, leave the apportionment of the rent to the jury, or may avow generally under the statute; and the Court may amend by substituting an avowry at common law, or by altering the rent avowed for according to the fact. (*Roberts* v. *Snell*, T. T. 1840, C. P., 1 M. & G. 577). It suffices if it can be collected from the avowry, that the rent was due from the plaintiff to the avowant, although not expressly alleged. (*James* v. *Colquhoun*, H. T. 1831, C. P., 7 Bing. 265; S. C. 5 M. & P. 63).

PHILPOTT *v.* DOBBINSON, M. T. 1829. C. P. 6 *Bing.* 104; S. C. 3 *M. & P.* 320.

AN avowry was for rent due for plaintiff as tenant of premises at a yearly rent of £——, but it appeared that the defendant was entitled to two-thirds only as tenant in common with a party who had omitted to execute the conveyance to him.

The Court held, that such avowry was not supported; although the landlord, since the statute, may avow generally, he must allege truly, and prove his title to the rent as alleged.

But a party entitled to only two-thirds cannot avow as owner of the whole.

STANIFORD *v.* SINCLAIR, T. T. 1824. C. P. 2 *Bing.* 193.

AN avowry by the defendants as executors of T. F., that the plaintiff for all the time during which the rent was accruing due, and from thence until and at the time when &c., and until and at the death of T. F., held the place in which &c., as tenant to T. F. in his lifetime, under a demise made to him, at a yearly rent, payable quarterly, and because two years' rent due from the plaintiff to T. F. in his lifetime remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which &c., from the death of T. F. till the time when &c., the defendants, as executors of T. F., well avowed the taking &c. On demurrer—

The Court held, that such avowry was sufficient, and might be supported.

Executors may avow for rent due in testator's time and their own, alleging a continuance of the tenancy.

(*c*) OF THE PLEAS. See ante, p. 317, n.

EVANS *v.* ELLIOTT, T. T. 1836. K. B. 6 *N. & M.* 606; S. C. 5 *Ad. & E.* 142.

THE plaintiff declared in replevin for taking and distraining cattle, and the defendant avowed for rent in arrear. Plea in bar, that, after the taking, and before impounding, the plaintiff tendered the rent and costs of distress.

The Court held the plea good on special demurrer.

Plea of tender of rent and costs before impounding good.

PASCOE *v.* PASCOE, T. T. 1837. C. P. 3 *Bing. N. S.* 898.

IN replevin, the defendant avowed as for rent-service at common law. In his plea in bar, the plaintiff alleged that the defendant demised and transferred the premises to the plaintiff for all the residue and remainder of his estate and interest therein, and that the defendant had not any reversionary estate or interest in the same. In his replication to the plea in bar, the defendant alleged that a reference of all matters in dispute had taken place, and that the arbitrator had decided in his award that the defendant should have authority to distrain.

The Court held, that the plea in bar to the avowry, admitting a demise, but setting up an assignment, was not incongruous.

So, plea that avowant had no interest in reversion good.

JOHNSON *v.* JONES, H. T. 1839. Q. B. 1 *P. & D.* 651; S. C. 9 *Ad. & E.* 809.

So, a special plea, shewing payment to a mortgagee, is good.

THE plea to an avowry of a distress for rent shewed that the defendant became tenant to the party who was mortgagor in possession, and that he had paid the rent to the mortgagee upon threats of compelling payment by law.

The Court held the plea good as a plea of payment, notwithstanding the statement of the circumstances shewing the liability, and that it did not amount to a plea of nil habuit in tenementis.

JONES *v.* POWELL, T. T. 1826. K. B. 5 *B. & C.* 647; S. C. 8 *D. & R.* 416.

But, to avowry for taking cattle for *rent*, plea, that they were not levant and couchant, is bad.

IN replevin to an avowry for rent in arrear, the owner pleaded that the cattle had not been levant and couchant on the premises. On demurrer—

The Court held the plea to be ill, because it might be that they were on the premises, either through his own neglect, or with his consent. Either of those circumstances would have rendered them liable; and that therefore should have been negatived.

DAVIS *v.* GYDE, H. T. 1835. K. B. 2 *Ad. & E.* 623.

So, the acceptance of a note in satisfaction cannot be pleaded in bar of avowry for rent.

IN replevin for rent, a plea as to part, alleging that a note had been given, payable at a time which had not expired, but not alleged to have been accepted in satisfaction, nor that by any agreement or circumstance the right of distraining had been suspended.

The Court held this insufficient. The demand for rent ranks with a specialty debt, and is not extinguished by a note, which constitutes a debt of inferior degree.

HOLLIS *v.* FREER, E. T. 1836. C. P. 2 *Bing. N. S.* 719.

Coverture of plaintiff, after suing out the writ, should be pleaded in abatement.

THE plaintiff sued in replevin in the county court as a feme sole, and then married. The defendants, after her marriage, removed the cause to this Court by writ of recordari facias loquelam, and the plaintiff declared in the name in which she had commenced the suit in the Court below:—Held, that the coverture of the plaintiff was a good plea in abatement of the writ, and that the defendants were entitled to judgment.

BARDONS *v.* SELBY, E. T. 1833. Ex. Ch. 9 *Bing.* 756; S. C. 3 *M. & Scott,* 280; S. C. 1 *C. & M.* 500; S. C. 3 *B. & Ad.* 1.

De injuriâ is a good plea in bar to an avowry for poor-rate.

IN replevin, the plea of the defendants alleged the taking as collectors of poor-rates, and stating the plaintiff's liability to be rated as an inhabitant by law rateable in respect of his occupation of a tenement, the making, allowing, and publishing the rate, demand, and refusal by the plaintiff, and the summons and warrant of distress under which the defendant took the plaintiff's goods. On special demurrer—

The Court held, that the plea in bar, de injuriâ, generally was good, although several matters were put in issue by the avowry.

VII. RELATIVE TO THE EVIDENCE*.

VIII. RELATIVE TO THE JURY†.

IX. RELATIVE TO PROCEEDINGS AT THE TRIAL‡.

X. RELATIVE TO THE COSTS.

STANILAND *v.* LUDLAM, M. T. 1825. K. B. 4 *B. & C.* 889; S. C. 6 *D. & R.* 484.

A DEFENDANT in replevin avowed as landlord for rent in arrear, and obtained a verdict.

Defendant, landlord, entitled to double costs, though action is really to try title§.

The Court held, he was entitled to double costs, although the action be really and bonâ fide brought to try the title to the land.

* Replevin. Avowry for 20*l.* as a half-year's rent in arrear. Pleas, 1st, non tenuit; and 2nd, as to 2*l.* 10*s.*, riens in arrere. At the foot of the indenture of lease, (which expressed the rent of the premises demised to be 40*l.* a year), and before its execution, were written the words "the allowance for the road to be made as usual." These words referred to an allowance (which had been usually made to the tenant of the demised premises) of 2*l.* 10*s.* half-yearly, being a sum paid by him to an adjoining occupier for a right of way to the demised premises:—Held, that this allowance was, at most, a mere covenant, and not an alteration of the rent so as to support the plea of non tenuit. (*Davies* v. *Stacey*, T. T. 1840, Q. B., 4 P. & D. 157).

† By Rule H. T., 1 Vict., it is ordered, "That no rule for a special jury be granted on behalf of a defendant or plaintiff in replevin, except on affidavit stating that no notice of trial, or for what day given, and, in the latter case, unless the application be made six days before that day;" but a Judge may order a rule for a special jury to be drawn up at any time. (*Reg. Gen.*, 4 Bing. N. S. 367; S. R. 3 M. & W. 154).

‡ Upon the issue no rent in arrear, the plaintiff is entitled to begin. (*Cooper* v. *Eyginton*, 1839, N. P., 8 C. & P. 748). So, any issue in which the affirmative is on the plaintiff gives him the right to begin. (*James* v. *Salter*, 1835, N. P., 1 M. & Rob. 501; S. P. *Curtis* v. *Wheeler*, 1830, N. P., 1 M. & M. 493). But where the plea was that the goods were the property of another, and not of plaintiff:—Held, that the defendant was entitled to begin. (*Colstone* v. *Hiscolbs*, 1837, N. P., 2 M. & Rob. 301).

In replevin, there was a cognizance for rent in arrear. To this there were two pleas; the one stating that a certain agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement, which second agreement was the demise in the cognizance mentioned, and that this latter agreement had been abandoned by mutual consent before any rent became due. The other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud. Replication to the one, denying the abandonment; and to the other, denying the fraud:—Held, that, on these proceedings, the plaintiff had the right to begin. (*Williams* v. *Thomas*, 1830, N. P., 4 C. & P. 234).

§ Where, in replevin, for the purpose of trying title amongst other rights, defendant avowed generally, under 11 Geo. 2, c. 19, for rent due on a demise under which defendant held as tenant to plaintiff:—Held, 1st, that the case was within the clause of the statute giving the defendant double costs; 2ndly, that, in calculating double costs, the officer was not bound to extract disbursements from the attorney's charges; and, 3rdly, that the costs of successful searches in registers to establish pedigrees were properly allowed. (*Johnson* v. *Lawson*, M. T. 1824, C. P., 2 Bing. 341).

If a defendant, in an action of replevin which is made a special jury cause,

XI. RELATIVE TO THE JUDGMENT.

EVANS *v.* REES, T. T. 1840. Q. B. 4 *P. & D.* 36.

Judgment will be entered nunc pro tunc if no laches imputable to the party.

THE defendant in replevin obtained a verdict at the Spring Assizes, but died before the ensuing term, within the first four days of which the plaintiff moved for, but was refused, a new trial; and, as a consequence of the lapse of time before the Court disposed of the motion, the judgment could not be entered up until the 8th of June, and then, no steps having been taken towards taxing, &c., the party was not in a state to enter it up until after Trinity Term.

The Court held, that, there being no laches in the party, the Court had authority to enter the judgment nunc pro tunc, as a power vested in them at common law, and not depending on the stat. 17 Car. 2, c. 8, s. 1.

XII. RELATIVE TO AMENDMENTS.

GAYLOR *v.* FARRANT, H. T. 1838. C. P. 6 *D. P. C.* 426; S. C. 4 *Bing. N. S.* 286.

A different holding may be amended at the trial under 3 & 4 Will. 4, c. 42*.

IN replevin, the principal point in dispute was, whether 100*l.* or 115*l.* was due. The jury found the latter, and that the rent was payable half-yearly, not quarterly, as avowed for, and a verdict passed for the defendants. Previous to the trial, the defendants' attorney had given notice that if any variance should appear upon the trial between the contract of tenancy set out in the avowry and cognizance, and the evidence adduced to support it, either as to the amount of rent reserved, or the days of payment of the rent, or otherwise, an application would be made at once to the Judge who presided, for leave to amend the avowry and cognizance, to cure the variance, and for permission to proceed upon the trial, as if no such amendment had been necessary.

The Court said, an amendment of an avowry and cognizance for rent in arrear, by altering the allegation of a quarterly to a half-yearly payment, may be made, under 3 & 4 Will. 4, c. 42, s. 24.

PRIOR *v.* DUKE OF BUCKINGHAM, T. T. 1824. C. P. 8 *Moore*, 584.

Avowries amended as to description of premises, amount of rent, &c.

IN replevin—

The Court allowed avowries to be amended as to the names of the premises, times of holding, and amounts of rent; also by inserting the exceptions and reservations on the demises laid; and, lastly,

withdraws his avowries, and the Judge directs him to pay "all costs," that will not include the costs of the special jury. (*Bell* v. *Tainthorp*, E. T. 1834, B. C., 2 D. P. C. 518).

If a defendant in replevin obtains judgment of non pros. for a return, and a certain amount for costs, the judgment is not final until taxation; but would be final if it had been for a return only. (*Wright* v. *Lewis*, M. T. 1840, Q. B., 9 D. P. C. 183).

* The Court will not amend if the other party would be prejudiced. (*Knight* v. *M'Dowall*, T. T. 1840, Q. B., 4 P. & D. 168).

by adding new avowries, varying in the amount of the rent, though after issue joined, and notice of trial given and countermanded.

XIII. RELATIVE TO INQUIRY, WRIT OF*.

XIV. RELATIVE TO SETTING ASIDE PROCEEDINGS†.

XV. RELATIVE TO NONSUIT‡.

XVI. RELATIVE TO NEW TRIALS.

SERJEANT *v.* CHAFY, H. T. 1836. K. B. 5 *Ad. & E.* 354.

After verdict Court will not amend avowry, and grant new trial.

THE declaration being dated before the first day of Easter, 1834, the defendant was not precluded from avowing doubly, and the jury found a less rent due than was claimed by the avowry, and the defendant did not apply to amend, the contest being, in fact, as to what was the rent—

The Court refused an application for a new trial, and to amend the avowry.

XVII. RELATIVE TO SPECIAL CASE§.

Requests, Court of.

I. RELATIVE TO THE COMMISSIONERS, p. 324.

II. RELATIVE TO THE PERSONS SUBJECT TO, IN GENERAL, p. 325.

III. RELATIVE TO WHAT CASES APPLICABLE, AND MODE OF TAKING ADVANTAGE OF, IN GENERAL.

(*a*) TO WHAT CASES APPLICABLE IN GENERAL, p. 325.

(*b*) OF PART PAYMENT AND PAYMENT OF MONEY INTO COURT, p. 326.

* Where plaintiff nonsuited, defendant not entitled to writ of inquiry to assess damages under statute giving him treble costs. (*Gotobed* v. *Wool*, E. T. 1817, K. B., 6 M. & Selw. 128).

† The Court refused to set aside an execution warranted by a regular judgment in replevin, on the ground of the bond having been generally for prosecuting a prior distress, although it might have been a ground for setting aside the proceedings in an earlier stage. (*Short* v. *Hubbard*, H. T. 1825, C. P., 2 Bing. 445).

‡ Although on an issue of non tenuit in replevin, the record is the defendant's, and he must prove his case; yet if he does not appear he must be nonsuited. (*Symes* v. *Larby*, T. T. 1826, N. P., 2 C. & P. 358).

§ Where, in replevin, a verdict was taken for the plaintiff, and the facts stated as a special case, but the avowant died before the case was argued, the Court allowed the plaintiff to enter judgment. (*Green* v. *Cobden*, T. T. 1837, C. P., 4 Scott, 486).

III. RELATIVE TO WHAT CASES APPLICABLE, AND MODE OF TAKING ADVANTAGE OF, IN GENERAL—*continued.*

(*c*) Of balances, p. 327.

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(*f*) Mode of taking advantage of.

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IV. RELATIVE TO THE NATURE AND EFFECT OF PARTICULAR ACTS,

(*a*) Of the Bath, p. 330.

(*b*) Of the Birmingham, p. 331.

(*c*) Of the Blackheath, p. 331.

(*d*) Of the Brixton, p. 331.

(*e*) Of the Gloucester, p. 331.

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(*i*) Of the St. Albans, p. 333.

(*j*) Of the Southwark, p. 333.

(*k*) Of the Tower Hamlets, p. 334.

(*l*) Of the Westminster, p. 334.

I. RELATIVE TO THE COMMISSIONERS.

Rex *v.* Governor of House of Correction, Middlesex, T. T. 1833. K. B. 2 *N. & M.* 138.

Since the 4 Geo. 4, the commissioners cannot commit to the house of correction*.

By a local act the commissioners of a court of requests were empowered to commit debtors in execution to the common jail or house of correction of the county; after which, by 4 Geo. 4, c. 64, the county magistrates were empowered by order to classify prisoners in the several jails and houses of correction, and, after such

* Where a local court of requests act authorized the commissioners to order any party insulting or abusing the Court during its sitting to be taken into custody, and empowered them to levy a fine, and commit for want of sufficient distress; it also entitled them to recover costs of any plaintiff, who should be non-

order, no other prisoners should be received but such as were specified in such order, and in various provisions distinguished between debtors and others.

The Court held, that the county magistrates having acted on the latter statute and made no order as to the reception of such debtors in the house of correction, that the option of the commissioners was thereby determined, and that they could not commit them to the house of correction.

II. RELATIVE TO THE PERSONS SUBJECT TO, IN GENERAL.

WETTENHALL *v.* WAKEFIELD, M. T. 1833. C. P. 10 *Bing.* 335; S. C. 3 *M. & Scott,* 805.

A barrister is not exempt.

ON a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, under the London Court of Conscience Act, (39 & 40 Geo. 3, c. 104), for the purpose of depriving him of costs. The motion was founded on the affidavit of the defendant, which stated that he was a barrister-at-law, and that he and the plaintiff, at the time of the commencement of the suit, were, and ever since have been, and still are, respectively inhabiting and resident in the city of London; and that he, this deponent, hath been, for and during all that time, and still is, liable to be summoned to the court of requests.

The Court held, that the 10th section of the 39 & 40 Geo. 3, s. 104, (the London Court of Requests Act), which renders attornies, solicitors, and other officers of the courts, &c. liable to the provisions of the statute, did not exempt barristers from such jurisdiction.

See 5 *&* 6 *Will.* 4, *c.* 94.

III. RELATIVE TO WHAT CASES APPLICABLE, AND MODE OF TAKING ADVANTAGE OF, IN GENERAL.

(*a*) TO WHAT CASES APPLICABLE IN GENERAL.

MANSFIELD *v.* BREAREY, H. T. 1834. K. B. 3 *N. & M.* 471; S. C. 1 *Ad. & E.* 347.

Where a special contract courts of requests acts do not apply †.

IN an action upon a special contract with the money counts, and a general verdict under 40*s.*—

The Court held, that, as it appeared that the verdict was for a

suited or discontinue any action for any thing done in the execution of their office:—Held, that they were not to be deemed persons "having power to commit to safe custody," within the 42 Geo. 3, c. 85, s. 6, entitling them to double costs. (*Mackey* v. *Goodden*, T. T. 1832, B. C., 1 D. P. C. 463).

* Under a court of requests act, it is no objection to the defendant's claim for costs that the plaintiff was unaware that the defendant resided within the jurisdiction. (*Crowder* v. *Bell*, E. T. 1834, B. C., 2 D. P. C. 508). But the party must clearly bring himself within the jurisdiction of the inferior court. (*Newton* v. *Peacock*, H. T. 1833, Ex, 1 D. P. C. 677).

† The London court of requests is not confined to actions of assumpsit or debt, but to liquidated demands, as a count for not accounting for goods sold, but not a count for not returning goods unsold. (*Postan* v. *Masser*, M. T. 1833, Ex., 4 Tyrw. 999).

debt, and also for the breach of a special contract, the Court could not say that it was for money had and received, so as to deprive the plaintiff of his costs upon a suggestion under a court of requests act.

TINGLE *v.* ROSTON, H. T. 1825. C. P. 2 *Bing.* 463.

Courts of requests have no jurisdiction over matters of a mere equitable nature.

ON a rule nisi, that a writ of accedas ad curiam from the court of requests at Sheffield might be set aside, on the ground that it had been issued improperly—

The Court decided, that, as it appeared in the return to the writ that the proceedings in the Court below were of an equitable nature, that Court would not entertain the writ, and made the rule absolute.

BADDLEY *v.* OLIVER, M. T. 1832. Ex. 1 *C. & M.* 219; S. C. 3 *Tyrw.* 145; S. C. 1 *D. P. C.* 598.

But Judge's certificate of speedy execution does not prevent operation of the statute.

A JUDGE at the assizes, in pursuance of the provisions of the 1 Will. 4, c. 7, ordered that the plaintiff should have execution within a limited time, and judgment was thereupon signed, and execution issued.

The Court held the defendant was not precluded from applying in the next term to the Court above to enter a suggestion to deprive the plaintiff of costs.

(*b*) OF PART PAYMENT, AND PAYMENT OF MONEY INTO COURT.

NIGHTINGALE *v.* BARNARD, E. T. 1827. C. P. 4 *Bing.* 169.—S. P. CHADWICK *v.* BUNNING, E. T. 1826. K. B. 5 *B. & C.* 534; S. C. 8 *D. & R.* 155, *semb. overruling* M'COLLAM *v.* CARR, 1 *B. & P.* 223.

When the debt is reduced below 40*s.* by part payment, a suggestion under the Middlesex Act allowed.

IN an action to recover 8*l.* 4*s.* for goods sold and delivered, a verdict had been taken for the plaintiff, at the trial of the cause, for nominal damages, subject to the award of an arbitrator, and the latter afterwards, by his award, ordered the verdict to be entered for 38*s.*, the debt having been reduced to that sum by part payment before action brought.

The Court ordered a suggestion to be entered on the roll to deprive the plaintiff of costs, under the Middlesex Court of Conscience Act.

TARRANT *v.* MORGAN, E. T. 1835. Ex. 2 *C., M. & R.* 252.

But the court of requests acts do not apply after payment of money into Court*.

THE action was brought for 8*l.* 2*s.*, and the defendant paid into Court a sum within the amount recoverable in the county court, and pleaded such payment under 17 Reg. Hil. T. 2 Will. 4, which the plaintiff accepted.

* The plaintiff, an apothecary, attended defendant's daughter, who did not reside with him, and his bill for such attendance amounted to 18*l.* 19*s.* 6*d.* The plaintiff also attended defendant's servant, and had delivered for such attendance a distinct bill amounting to 1*l.* 0*s.* 6*d.* The plaintiff sued out a writ indorsed 18*l.* 19*s.* 6*d.*; but, when he declared, inserted in his particulars his other claim of 1*l.* 0*s.* 6*d.* The defendant paid this latter amount into Court, which the plaintiff took out in satisfaction. The defendant resided within the limits of a local court for the recovery of debts to the amount of 40*s.*:—Held, that, as the plaintiff had misled the defendant by the indorsement, he was entitled to costs. (*Thompson* v. *Gill*, M. T. 1837, Ex., 6 D. P. C. 155).

The Court held, that the defendant was not entitled to enter a suggestion, the costs being expressly reserved to the plaintiff by the rule.

(*c*) Of balances.

CARDEN *v.* BURFORD, E. T. 1828. K. B. 2 *M. & R.* 170.

Plaintiff may recover in the superior Courts a claim for a balance of account, although the last item be less than 5*l.**

BY 5 Geo. 3, c. 8, and 47 Geo. 3, c. 4, an exclusive jurisdiction is given to a court of requests over debts not exceeding 5*l.*, with an exception of actions for the balance of an account originally exceeding that sum.

The Court held, that a party who sold several articles, which the vendee treats as forming part of one account, may sue in the inferior courts, though all the items of the account have been satisfied except the last, which did not amount to 5*l.*

(*d*) Of set-off.

JENKINSON *v.* MORTON, E. T. 1836. Ex. 1 *M. & W.* 300.

Court of requests acts do not apply where the claim is reduced by set-off †.

THIS was an action on a tailor's bill for 17*l.*; the defendant pleaded a set-off. At the trial before the under-sheriff of Middlesex, the defendant established a set-off to the amount of 16*l.* 5*s.* only, and the plaintiff accordingly had a verdict for 15*s.* On a rule nisi to enter a suggestion on the roll, under the Middlesex County Court Act, (23 Geo. 2, c. 33, s. 19), for the purpose of entitling the defendant to double costs—

Per Cur.—It is clear, that the general construction applicable to statutes of this nature is, that they extend to cases where the debt is reduced by payment, or other matter amounting to satisfaction, but not to cases of set-off.

(*e*) Of trials before the sheriff‡.

* And a party suing in a superior Court for the balance of an account, the original debt exceeding 5*l.*, but which has been reduced to 30*s.*, is not liable to costs under the Tower Hamlets Court of Requests Act. (*Green* v. *Bolton*, H. T. 1838, C. P., 6 D. P. C. 434; S. C. 4 Bing. N. S. 308).

It seems that an action may be said to be brought for the balance of an account which originally exceeded 5*l.*, where the aggregate of the items exceeds that sum, although at no time such sum was due. (*Moreau* v. *Hicks*, H. T. 1835, K. B., 4 N. & M. 563).

† Where the plaintiff being indebted to the defendant in a much larger sum than he sought to recover, there had been an agreement that the latter should set-off the plaintiff's claim, and she subsequently sued him in the court of requests for 5*l.*, being less than was really due, without adverting to any balance, in full discharge of her whole debt:—Held, that she was, notwithstanding, entitled to the benefit of the agreement, and that the plaintiff could not support an action for his original claim. (*Penny* v. *Squier*, H. T. 1831, K. B., 2 B. & Ad. 142),

‡ Where a cause is tried by writ of trial, and execution issued in vacation, the defendant may apply in the ensuing term to enter a suggestion to deprive the

(*f*) Mode of taking advantage of.

1. *By Plea.*

Burrough *v.* Hodgson, H. T. 1839. Q. B. 1 *P. & D.* 328.

The proper form of plea is that the defendant was not indebted in any sums amounting to 40*s.* or that amount.

To a declaration in debt, the defendant pleaded a defence under the Westminster Court of Requests Act in this form:—As to all except 1*l.* 13*s.* 8*d.*, nunquam indebitatus; and as to 1*l.* 13*s.* 8*d.*, that the defendant was not indebted to the plaintiff to a greater amount than 1*l.* 13*s.* 8*d.*; that he was liable to be sued for that sum in the Westminster court of requests; that at the commencement of the suit, the said debt of 1*l.* 13*s.* 8*d.*, being a debt not exceeding 40*s.*, was recoverable by the plaintiff in that Court, and the plaintiff sued in this Court for that sum, contra formam statuti, concluding with a prayer of judgment as to the sum of 1*l.* 13*s.* 8*d.*

The Court held, that the plea was bad as tendering an insufficient issue, viz. whether the sum of 1*l.* 13*s.* 8*d.* was due, and not whether the sum due was under 40*s.*; the plea should have been that the defendant was not indebted to any sums amounting to 40*s.* or that amount.

Sandall *v.* Bennett, M. T. 1834. K. B. 4 *N. & M.* 89; S. C. 2 *Ad. & E.* 204; S. C. 3 *D. P. C.* 294.

A plea of a court of requests act must negative the excepted cases.

Plea, that the action was brought for 40*s.*, and that the defendant resided in Middlesex, and was liable to be summoned in the county court. On demurrer—

The Court held the plea bad, for not negativing that the exceptions in the statute would come in question.

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2. *By Suggestion.*

Defries *v.* Snell, H. T. 1836. Ex. 4 *D. P. C.* 680; S. C. 1 *T. & G.* 206.

No suggestion where defendant can have judgment on his plea*.

In assumpsit, the defendant pleaded amongst other pleas the general issue, and that the debt was under 40*s.*, and that he was resident within the jurisdiction of a court of requests having cognizance, and the jury found for the plaintiff on the general issue, and damages under 40*s.*, and for the defendant on the latter plea.

plaintiff of costs, and it is not necessary that there should be a previous order to stay proceedings. (*Johnson* v. *Veal*, T. T. 1839, Ex., 7 D. P. C. 487). Hence, an application to enter a suggestion on the roll under the Middlesex County Court Act for costs may be made as well in a case tried before the sheriff as a case tried in one of the superior Courts. (*Forbes* v. *Simmons*, M. T. 1840, Q. B., 9 D. P. C. 37). A defendant, by consenting to a cause being tried before the sheriff under the Writ of Trial Act, knowing at the time that he was liable to be sued in a local court only, does not thereby waive his right to claim costs from the plaintiff upon his recovering less than 5*l.* (*Shaw* v. *Oates*, H. T. 1836, B. C., 4 D. P. C. 720).

* So, no suggestion is necessary on a discontinuance; (*Fosbrooke* v. *Holt*, H. T. 1836, Ex., 4 D. P. C. 700; S. C. 1 M. & W. 205); and it is in the discretion of the Court as to whether they will allow a suggestion to be entered. (*Cottle* v. *Langham*, M. T. 1824, C. P., 9 Moore, 625). If a plaintiff by his indorsement on the writ claims an amount recoverable in a court of requests, the Court will

The Court refused to enter a suggestion, on the ground that the defendant might, by entering up judgment on that plea, have the full benefit of the act.

HIPPESLEY *v.* LAYNG, M. T. 1825. K. B. 4 *B. & C.* 863; S. C. 6 *D. & R.* 265.

A MOTION to enter a suggestion to deprive the plaintiff of costs might have been made in Easter Term; but, instead of that, a negotiation respecting the costs was then entered into, and the motion was made in Trinity Term.

Motion to deprive plaintiff of costs must be made promptly*.

The Court held, that it was too late. Where a court of requests act enables a defendant to deprive a plaintiff of his costs if he sues in a superior Court, the defendant must make his application for that purpose promptly.

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3. Affidavit connected with.

MOREAU *v.* HICKS, H. T. 1835. K. B. 4 *N. & M.* 563.

IN an affidavit to ground a motion to deprive a plaintiff of his costs, on the ground that the subject-matter of the action was cognizable in a certain court of requests, a statement that the defendant resides at a place within the jurisdiction of the court of requests, without stating that he resided at the time of the action brought—

The affidavit must be that the defendant at the "time of the action" resided, &c.†.

The Court held, insufficient.

(*g*) EFFECT OF STATUTE BEING REPEALED‡.

(*h*) WAIVER OF§.

not, on payment of that sum, relieve the defendant from costs before trial, but will leave him to apply to enter a suggestion. (*King* v. *Myers*, T. T. 1837, B. C., 5 D. P. C. 686).

* A defendant may move to enter a suggestion to deprive the plaintiff of costs notwithstanding final judgment may have been signed, if the application be made as early as can be done, and the costs have not been taxed. (*Godson* v. *Lloyd*, T. T. 1835, B. C., 4 D. P. C. 157). And where the final judgment is signed in vacation, it is not too late to apply for a suggestion in the following term; but the rule will be qualified with the condition of payment of costs incurred by the plaintiff since the judgment. (*Herle* v. *Erle*, E. T. 1837, Ex., 2 M. & W. 383). Previous to making an application with respect to costs, under the London Court of Requests Act, it is not necessary to have the record in Court. (*Kidd* v. *Mason*, M. T. 1834, B. C., 3 D. P. C. 85).

† Where, in the affidavits produced on the motion, there is no allegation of the amount of the debt for which the action is brought; but the copy of the writ of summons with which the defendant was served is annexed, indorsed that the plaintiff claims 4*l.* 2*s.* 5*d.* debt, that is sufficient proof of the action being brought for a sum "not exceeding £5." (*Burton* v. *Campbell*, H. T. 1838, C. P., 6 D. P. C. 451).

‡ To a debt for goods sold, the defendant pleaded the Westminster Court of Requests Act. After plea, and before trial, that act was repealed by another, which contained no provision respecting actions then pending. A verdict having been found for the defendant:—Held, that the plaintiff was entitled to judgment non obstante veredicto. (*Warne* v. *Beresford*, M. T. 1837, Ex., 6 D. P. C. 157; S. C. 2 M. & W. 848).

§ The defendant is entitled to have a suggestion entered under a court of requests act, and it is no waiver, though the cause was tried before the sheriff by

(*i*) Plea of justification under*.

(*j*) Staying proceedings.

Cornforth *v.* Lowcock, M. T. 1827. K. B. 1 *M. & R.* 321.

The Court on motion will stay proceedings on payment of debt, and no costs on either side.

On a rule to shew cause why, upon payment of 4*l.* 15*s.*, the amount of the debt, the proceedings should not be stayed, and why the plaintiff should not pay the costs of the application. This rule was obtained upon an affidavit, stating the amount of the debt; and that at the time of the commencement of the action the defendant was resident within the jurisdiction of the court of requests for Birmingham, which court was created by the stat. 25 Geo. 2, c. 34, and extended by stat. 47 Geo. 3, c. 14, to debts not exceeding 5*l.*, and which last statute deprived a plaintiff of costs in case he did not recover more than 5*l.*

Per Cur.—This rule is certainly too large. Let there be a stet processus entered on payment of the debt. No costs on either side.

(*k*) Judgment†.

(*l*) Certiorari connected with‡.

IV. RELATIVE TO THE NATURE AND EFFECT OF PARTICULAR ACTS.

(*a*) Of the bath. See 46 *Geo* 3, *c.* 67.

Graham *v.* Browne, H. T. 1832. Ex. 2 *C. & J.* 327; S. C. 2 *Tyrw.* 309.

A defendant residing at Bath

Action on a bill of exchange for 8*l.* 16*s.*, dated London, drawn and indorsed by King to the plaintiff, and accepted by the defend-

the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed, and execution issued. (*Bond* v. *Bailey*, E. T. 1835, Ex., 3 D. P. C. 808).

* Plea in trespass, justifying the entry under a judgment and execution in the court of requests, the local act authorizing service, either personally, or by leaving it at the dwelling-house, lodging, or place of abode:—Held, 1st, that where the party was a sea-faring man, usually absent for six months, service at the lodging of the wife was sufficient; and that the action was to be deemed to be brought against the defendant "on account of an order, determination, judgment, or decree of the commissioners," entitling him to give the special matter of defence in evidence under the general issue; (*Calverson* v. *Melton*, 1837, N. P., 2 M. & Rob. 200); but, in *Cock* v. *Gent*, it was held by the Court of Exchequer, M. T. 1843, that the different court of requests acts are statute, local, and personal within 5 & 6 Vict. c. 97, and a special justification must be pleaded.

† The Judge of the Belper Court of Requests, created by 2 & 3 Vict. c. 98, has no power to alter at one Court, without consent, a judgment in favour of the defendant into a judgment of nonsuit pronounced by mistake at another; and if he does, and the plaintiff proceeds in a second plaint for the same cause of action, the latter proceedings are a nullity, and the defendant may so treat them, and the Q. B. will set them aside even after verdict. (*Webster* v. *Mason*, T. T. 1840, Q. B., 8 D. P. C. 705).

‡ After removing a plaint from the Brighton court of requests into the Queen's Bench, the affidavit held to be properly intitled as in a cause in the latter Court; held also, that the Judge in the superior Court, having heard both sides, and dismissed the case, it was a decision, and not in the nature of a nonsuit. (*Franks* v. *Wicks*, M. T. 1840, B C., 9 D. P. C. 178).

ant, payable at a London banker's. King, the drawer, and the plaintiff lived in London, and the bill of exchange was given for a debt, contracted in London; but the defendant resided within the jurisdiction of the Bath Court of Requests.

is entitled to benefit of act, though sued as acceptor of bill of exchange, dated at London, and all other parties resided there*.

Per Cur.—The Bath Court of Requests Act applies where the defendant is resident within the jurisdiction; although the plaintiff does not reside, and the cause of action did not accrue therein, the defendant is entitled to enter a suggestion on the roll to deprive the plaintiff of his costs.

(*b*) Of the Birmingham†. See 47 *Geo.* 3, *st.* 1, *c.* 14.

(*c*) Of the Blackheath‡. See 6 *& 7 Will.* 4, *c.* 120.

(*d*) Of the Brixton§. See 46 *Geo.* 3, *c.* 88.

(*e*) Of the Gloucester‖. See 1 *W. & M.*

* The Bath Act does not extend to actions of trover. (*Weare* v. *Calder*, T. T. 1828, K. B., 9 D. & R. 546). And the Bath Act (45 Geo. 3, c. 57) held not to give jurisdiction as to compensation for attending before the Court of revising barristers, and that, the want of jurisdiction appearing on the face of the proceedings, the objection might be made, upon motion for prohibition, after the judgment and execution, where the party had not acquiesced in the proceedings below. (*Roberts* v. *Humby*, M. T. 1837, Ex., 6 D. P. C. 82; S. C. 3 M. & W. 120). Under the Bath Act, 45 Geo. 3, c. 67, the plaintiff suing in the superior Courts, being declared not entitled to costs by reason of a verdict, the Court refused, before verdict, to interfere and stay the proceedings. (*Meredith* v. *Dew*, T. T. 1832, C. P., 8 Bing. 143; S. C. 1 M. & Scott, 225).

† The defendant held not to preclude himself from the benefit of entering a suggestion, under the Birmingham Court of Requests Act, by plea of payment into Court, or having consented to an order for trial before the under-sheriff. (*Turner* v. *Barnard*, T. T. 1836, B. C., 5 D. P. C. 170).

‡ Where the plaintiff sued for 2*l.* 15*s.*, the balance of a demand of 5*l.* 15*s.*, but which the jury found to have been originally under £5, and obtained a verdict for 1*l.* 2*s.* 6*d.*, the local court of requests act (Blackheath) having jurisdiction over demands not exceeding £5, not being the balance of any account originally exceeding that sum; and a subsequent act gave the superior Courts concurrent jurisdiction where the sum sought to be recovered was 40*s.*:—Held, that those words were to be taken to mean the sum which the plaintiff actually recovers, and the plaintiff having no right to sue in the superior Court, the defendant was entitled to a suggestion for his costs. (*Cross* v. *Collins*, M. T. 1838, C. P., 5 Bing. N. S. 194).

§ The act applies to cases where there is on the record a plea of payment into Court, or where tried before the sheriff. (*Bernard* v. *Turner*, T. T. 1836, Ex., 1 Tyrw. & G. 942; S. C. 5 D. P. C. 170; S. C. 1 M. & W. 584). And a suggestion entered on the roll to deprive the plaintiff of costs, under the West Brixton Court of Requests Act (46 Geo. 3, c. 88), when the debt is below £5; and it is not necessary that the plaintiff should be resident within the jurisdiction. (*Hamley* v. *Hutton*, M. T. 1836, B. C., 5 D. P. C. 332; S. P. *Pritchard* v. *Macgill*, Id. 731). But where the defendant, a builder, residing without the jurisdiction of B., made bricks for sale, which he occasionally sent to B., and the market of which he attended:—Held, not to be a party "using or frequenting the market, or trading or dealing there," and liable to be sued only within the inferior jurisdiction. Those words, semble, require that the party's livelihood should be substantially obtained by such acts. (*Jones* v. *Taylor*, E. T. 1836, Ex., 1 Tyrw. & G. 940; S. C. 1 M. & W. 578).

‖ The word "trial" in the Gloucester Court of Requests Act held to apply to the writ of trial before the sheriff; but the right of the defendant to avail himself of it, held no objection to the writ of trial issuing. (*Croad* v. *Harris*, H. T. 1836, B. C., 4 D. P. C. 616).

(*f*) Of the Isle of Wight.

OAKES *v.* ALBIN, M. T. 1824. Ex. 1 *M'Clell.* 582.

Under 46 Geo. 3, c. 66, (the Isle of Wight Act) defendant residing there sufficient to give court of requests jurisdiction*.

A RULE to deprive the plaintiff of costs was granted on an affidavit of the defendant, stating that at the time of the commencement of the suit, and ever since, he had been, and still was, inhabiting and residing within the Isle of Wight, to wit, in &c.; and that he had been for and during all that time, and still was, liable to be summoned to the courts of requests for the said Isle, and the several townships and places within the same; that the plaintiff on the trial of the cause obtained a verdict for £5 and no more; and that the debt was recoverable in the said Court.

The Court held, that a person resident within the jurisdiction of the Isle of Wight court of requests, and owing a sum of £5 on the balance of an account, is privileged to be sued for the debt in that Court; and therefore, if the creditor proceed, and recover a verdict to that amount in a superior Court, the defendant is entitled to a suggestion entered on the roll to deprive him of costs, pursuant to the stat. 46 Geo. 3, c. 66, ss. 11, 17, 40, notwithstanding that the contract was made elsewhere, and although the plaintiff was ignorant that the defendant resided within the jurisdiction, and claimed a larger sum.

(*g*) Of the London. See 5 & 6 *Will.* 4, *c.* 94.

SHADDICK *v.* BENNETT, M. T. 1825. K. B. 4 *B. & C.* 769; S. C. 7 *D. & R.* 229.

Before statute 5 & 6 Will. 4, where acknowledgment shewn under plea of Statute of Limitations for £3 only, plaintiff not entitled to costs under 39 & 40 Geo. 3, c. 104†.

THE plaintiff proved a debt of £26. The defendant had pleaded the Statute of Limitations. To take the case out of the statute, the plaintiff put in evidence a letter from the defendant, in which he stated that he did not owe more than £3, for which sum the jury gave a verdict.

The Court allowed a suggestion to be entered on the roll, under the London Court of Conscience Act, in order to deprive the plaintiff of his costs.

* But an action for not using a farm in a tenant-like manner is not within the meaning of the 46 Geo. 3, c. 66, (the Isle of Wight Court of Requests Act). (*Wittam* v. *Urry*, T. T. 1834, B. C., 2 D. P. C. 543).

† The captain of a trading vessel in the habit of loading and unloading his cargo, and depositing it in a warehouse at a wharf in London, but having no residence, counting-house, or warehouse in the city, is not within the London Court of Requests Act. (*Double* v. *Gibbs*, M. T. 1832, Ex., 1 C. & M. 246; S. C. 1 D. P. C. 583; S. C. 3 Tyrw. 224). So, where the defendant had only a counting-house within the city of London, for the purpose of receiving orders, his residence and place of business being in Surrey:—Held, that he was not entitled to the privilege of being only sued in the London Court of Requests Act. (*Kemsett* v. *West*, M. T. 1824, K. B., 5 D. & R. 626). But where it appeared that both parties lived within the jurisdiction of the London court of requests, and the jury found less than £5 to be due, the Court staid proceedings upon payment of the damages without costs. (*Fleming* v. *Davis*, T. T. 1824, K. B., 5 D. & R. 37). It seems the exception in the London Act does not comprise an action for use and occupation. (*Double* v. *Gibb*, M. T. 1832, Ex., 1 C. & M. 246; S. C. 3 Tyrw. 224).

(*h*) Of the Middlesex. See 23 *Geo.* 3, *c.* 33.

Bailey *v.* Chitty, M. T. 1836. Ex. 5 *D. P. C.* 307; S. C. 2 *M. & W.* 28.

This action was for work, &c.; part of the demand was as a broker for levying a distress in Surrey.

Under the Middlesex Act defendant must reside and cause of action accrue within the county*.

The Court held, that the action could not be brought in the county court of Middlesex, which requires both that the defendant should reside and the cause of action arise within the county.

Strutton *v.* Whitwell, H. T. 1828. K. B. 1 *M. & R.* 562.

The plaintiff had brought an action of assumpsit against the defendant, in which the latter had suffered judgment to go by default; and upon the execution of the writ of inquiry the jury assessed the damages under 40*s.* On a rule nisi for entering a suggestion on the roll pursuant to the Middlesex County Court Act, (23 Geo. 2, c. 33, s. 19), to deprive the plaintiff of costs—

A suggestion under Middlesex Act, for double costs, not allowed after judgment by default and writ of inquiry.

Per Cur.—The case of *Hains* v. *Lloyd* (4 M. & Selw. 171) decided that a suggestion cannot be entered under this act of Parliament, in order to entitle the defendant to double costs, after judgment by default and writ of inquiry, but only where there has been a trial. We are of opinion that that was a right decision, and we consider it much better to act upon it in the first instance, than by granting a rule to shew cause to unsettle the question.

(*i*) Of the St. Albans. See 25 *Geo.* 2, *c.* 28.

Anstee *v.* Liley, H. T. 1828. K. B. 1 *M. & R.* 564.

On motion as to costs under the St. Albans Court of Requests Act—

Under St. Albans Act defendant must plead his residency.

The Court said, where an act of Parliament which establishes a court of local jurisdiction for the recovery of debts, has a clause prohibiting the commencing of actions in any other court against a defendant residing within the jurisdiction, and enabling the defendant to plead that act in bar, he must plead the act or give it in evidence under the general issue. After verdict, the Court will not assist him.

(*j*) Of the Southwark†. See 4 *Geo.* 4, *c.* 123.

* But, where the verdict was reduced under 40*s.* by the Court on the ground of the plaintiff not being entitled to recover part of the demand, not being a duly licensed apothecary, and so to be taken as if no debt, the defendant was entitled to enter a suggestion, under the Middlesex Court of Requests Act. (*Wells* v. *Langridge*, H. T. 1837, B. C., 5 D. P. C. 509). Under the Middlesex Act the plaintiff is liable to be deprived of costs, although the verdict be reduced by the plea of the Statute of Limitations. (*Bailey* v. *Chitty*, M. T. 1836, Ex., 5 D. P. C. 307; S. C. 2 M. & W. 28). An affidavit in support of an application for double costs, under the 23 Geo. 2, c. 33, s. 9, (the Middlesex County Court Act), must state the defendant liable to be summoned to the county court. (*Unwin* v. *King*, E. T. 1834, B. C., 2 D. P. C. 492).

† The 4th of Geo. 4, c. 123, repeals the previous Southwark Court of Requests Acts, as to depriving a plaintiff of costs where he recovers less than 40*s.* (*Claridge* v. *Smith*, H. T. 1836, B. C., 4 D. P. C. 583).

(*k*) Of the Tower Hamlets. See 2 *Will.* 4, *c.* 65.

(*l*) Of the Westminster*. See 6 *&* 7 *Will.* 4, *c.* 137.

Replication†. See particular heads according to subject-matter.

Rescue‡. See also tit. *Escape.*

Respondentia. See tits. *Bottomry and Respondentia—Ship and Shipping.*

Restitution. See tit. *Replevin.*

* Under the late Westminster Act, 23 Geo. 2, c. 27, upon an issue as to the amount of the debt:—Held, that the plea is given only to inhabitants and residents; but the privilege of the jurisdiction is to persons "seeking their livelihood," as well as to inhabitants within the city. (*Scotts* v. *Seager*, H. T. 1833, N. P., 1 M. & Rob. 244). The jurisdiction of the Westminster Court of Requests is confined to cases of debt, and does not extend to any matter properly the subject of an action on the case for unliquidated damages. (*Soames* v. *Rawlings*, M. T. 1835, Ex., 4 D. P. C. 501; 2 C., M. & R. 744; S. C. 1 Tyrw. 46). And, to entitle a defendant to the suggestion under the Westminster Act, (6 & 7 Will. 4, c. 137, s. 86), he must swear distinctly, and in terms, that he was at the time of the commencement of the action residing or inhabiting within the jurisdiction. (*White* v. *Jeffert*, T. T. 1838, C. P., 5 Scott, 744; see *Todd* v. *Emly*, T. T. 1843, MSS.)

† Rule T. T. 1 Will. 4 orders, that no judgment of non pros. shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made in writing, upon the plaintiff, his attorney, or agent, as the case may be. There is no fixed time for replying, and, to compel parties to do so, there must be a rule, which may be given at any time when the office is open. (H. T. 2 Will. 4). And service of a rule to reply or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading, (H. T. 2 Will. 4); this Rule therefore dispenses with the demand of replication required by Rule T. T. 1 Will. 4, before signing judgment of non pros.

By Rule H. T. 4 Will. 4, it shall not be necessary, in any replication or subsequent pleading intended to be pleaded in bar of the whole action, to use any allegation of "precludi non," or to the like effect, or any prayer of judgment, and all replications and subsequent pleadings, without such formal parts, shall be taken, unless otherwise expressed, as pleaded in bar of the whole action, provided nothing herein contained shall extend to cases where an estoppel is pleaded.

‡ If a hayward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are damage feasant in the enclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier. (*Rex* v. *Bradshaw*, 1835, N. P., 7 C. & P. 233). Upon a return made by the sheriff of "rescue" from his bailiffs, attachment granted against rescuer. (*Godby* v. *Dewes*, E. T. 1834, C. P., 10 Bing. 112).

Retorno Habendo. See tit. *Replevin.*

Retraxit*.

Return, false, Action for. See tit. *Sheriff.*

Reversioner.

WRIGHT *v.* WILLIAMS, T. T. 1836. Ex. 1 *M. & W.* 775; S. C. 1 *T. & G.* 375.

The plaintiff must allege he has the reversion if the defendant claims a life estate†.

IN case for an injury to the plaintiff's reversionary interest—

The Court held, that, in a plea under 2 & 3 Will. 4, c. 71, it was sufficient to allege a user to have existed for four years "before the commencement of the suit," without alleging it before the act complained of; and that a replication to such plea of the defendant having only a life estate must shew that the plaintiff was the person entitled to the reversion expectant on the determination of the life estate.

Reward.

ENGLAND *v.* DAVIDSON, E. T. 1840. Q. B. 11 *Ad. & E.* 856; S. C. 3 *P. & D.* 594.

A policeman is entitled to a reward.

IN an action of assumpsit for a reward offered by defendant to a party giving information as to a burglary; plea, that the plaintiff was a policeman, and that it was his duty to give such information, &c. On demurrer—

The Court held the plea bad, as he might have rendered services beyond what he was bound to do as such officer.

* A retraxit is a bar to any future action for the same cause. It must formerly have been made in person in open Court when the trial was called on; (2 Sell. 338); but by H. T. 2 Will. 4, where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the Court.

† No action will lie by the reversioner for an injury to his reversionary interest by reason of a trespass committed on the land by a stranger during a subsisting tenancy, although that trespass may have been committed under a claim of a right of way. (*Baxter* v. *Taylor*, M. T. 1832, K. B., 1 N. & M. 11; S. C. 4 B. & Ad. 72). But the erection on the defendant's house of eaves, and a pipe overhanging and conducting water on land in the occupation of a tenant, is a permanent injury, which gives a right of action to the reversioner. (*Tucker* v. *Newman*, M. T. 1839, Q. B., 3 P. & D. 14). Where the plaintiff had demised cottages, without any exception of mines, and the defendant, by excavating mines under the premises, had injured the water:—Held, that the plaintiff was entitled

WILLIAMS *v.* CARWARDINE, E. T. 1833. K. B. 1 *N. & M.* 418.

And party is entitled to receive amount if he has complied with terms offered, whatever might be his motives*.

THIS was an action of assumpsit upon a hand bill, which stated that "whoever would give such information as might lead to a discovery of the murder of Walter Carwardine should, on conviction, receive a reward of 20*l.*," &c. It appeared that the plaintiff was the party who first gave information which afterwards led to the conviction of the murderer; but that it was not given with any view to the reward, nor with any intention to avail herself of it, but proceeded from entirely other motives. A verdict was found for the plaintiff for 20*l.*

Per Cur.—It is a general promise held out to the population of the country, that whoever should give information which should lead to the conviction of the murderer should receive a reward. That gives a right of action, and the Court cannot enter into the motives of the party giving that information.

Right, Petition of†.

Right, Writ of‡.

LEIGH *v.* LEIGH, H. T. 1836. C. P. 4 *D. P. C.* 650; S. C. 2 *Bing. N. S.* 464; S. C. 2 *Scott*, 666.

Under 3 & 4 Will. 4, the plaintiff cannot amend the writ and serve it three terms afterwards.

A WRIT of right issued on the 29th December, 1834, returnable on the 26th January, 1835. The return day was altered from term to term, until it was finally made returnable in November 1835.

The Court held, that the resealing made it a new writ, and the right of action was barred by the 3 & 4 Will. 4, c. 27, s. 38.

to maintain case for the injury to his reversionary interest. (*Raine* v. *Alderson*, H. T. 1838, C. P., 4 Bing. N. S. 702; S. C. 6 Scott, 691; see 1 M. & W. 452). So, the reversioner is entitled to sustain a second action for the injury to his reversion by continuing an obstruction, &c., upon an issue of its being "the same identical grievance:" the continuance of the injury for a subsequent period negatives that issue. (*Shadwell* v. *Hutchinson*, M. T. 1830, N. P., 4 C. & P. 333).

In case by a reversioner for an injury to the reversion by pulling down certain parts of a building, upon the question, whether the plaintiff's reversionary interest was sufficiently established by mere parol proof of the occupier holding the premises as tenant to the plaintiff, without producing the written agreement under which he held, the Court was equally divided. (*Strother* v. *Barr*, M. T. 1828, C. P., 5 Bing. 136; S. C. 2 M. & P. 207).

* In an action for a reward offered to "whomsoever should give information whereby the property taken on a robbery might be traced, on conviction of the parties:"—Held, that the party entitled was he who first gave such information, although not communicated immediately to the party robbed, but to a party authorized to receive it, and act in the apprehension as a constable. (*Lancaster* v. *Walsh*, T. T. 1838, Ex., 4 M. & W. 16).

Rewards, under the stat. 7 Geo. 4, c. 64, s. 28, for the apprehension of offenders, are not confined to cases where the person apprehended has had a loss of time, or has been at an expense. (*Rex* v. *Barnes*, 1835, N. P., 7 C. & P. 166).

† A petition was indorsed "soit droit fait," but not specially referring it to the Court:—Held, that it could not adjudicate thereon. (*Perring, Ex parte*, T. T. 1837, Ex., 5 D. P. C. 750).

‡ By 3 & 4 Will. 4, c. 27, s. 36, it is enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of

Riot.

See 7 & 8 *Geo.* 4, *c.* 30.

I. RELATIVE TO THE CIRCUMSTANCES NECESSARY TO CONSTITUTE THE OFFENCE, p. 338.

II. RELATIVE TO WHO MAY BE GUILTY OF, p. 338.

III. RELATIVE TO THE INDICTMENT, p. 338.

right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of deceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action, real or mixed, (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for free-bench or dower), shall be brought after the 31st day of December 1834.

See *Jones*, dem., *Wright*, ten., T. T. 1828, C. P., 2 M. & P. 318; *Webb*, dem., *Jones*, ten., 5 Bing. 285; *Tooth* v. *Bagwell*, H. T. 1826, C. P., 3 Bing. 373; *Miller* v. *Miller*, H. T. 1835, C. P., 2 Bing. N. S. 66.

Sheriff's Return.]—See *Angell* v. *Angell*, H. T. 1826, C. P., 3 Bing. 393; *Foot* v. *Angell*, H. T. 1836, C. P., 4 D. P. C. 652; S. C. 2 Bing. N. S. 528; S. C. 2 Scott, 806.

Pleadings.]—See *Rowles* v. *Bowly*, H. T. 1828, C. P., 4 Bing. 428; S. C. 1 M. & P. 102; *Twining* v. *Lowndes*, H. T. 1835, C. P., 2 Bing. N. S. 133; *Rushton* v. *Nesbitt*, M. T. 1834, K. B., 6 Ad. & E. 103.

Evidence.]—See *Spires*, dem., *Morris*, ten., E. T. 1833, C. P., 9 Bing. 690; S. C. 3 M. & Scott, 124; *Spires*, dem., *Morris*, ten., 9 Bing. 687; S. C. 3 M. & Scott, 118; S. P. *Jones*, dem., *Brearly*, ten., 1832, N. P., 5 C. & P. 319; *Dumsday*, dem., *Hughes*, ten., E. T. 1834, C. P., 3 Bing. 439; S. C. 4 Scott, 209.

Witnesses.]—See *Davies* v. *Lowndes*, M. T. 1838, C. P., 6 Scott, 738; S. C. 5 Bing. N. S. 161.

Right to begin.]—See *Tooth* v. *Bagwell*, E. T. 1826, C. P., 3 Bing. 446.

Of the jury.]—See *Tooth* v. *Bagwell*, M. T. 1825, N. P., 2 C. & P. 187; *Carne* v. *Nicoll*, M. T. 1834, C. P., 3 D. P. C. 115; S. C. 1 Scott, 68; *Davies*, dem., *Lloyd*, ten., T. T. 1838, C. P., 6 Scott, 435; S. C. 4 Bing. N. S. 711.

Amendment.]—See *Worley* v. *Blunt*, H. T. 1833, C. P., 1 D. P. C. 728; S. C. 2 M. & Scott, 799; S. C. 9 Bing. 635.

Staying and setting aside.]—See *Bowyear* v. *Bowyear*, E. T. 1833, C. P., 3 M. & Scott, 65; *Foot* v. *Sheriff*, H. T. 1836, C. P., 4 D. P. C. 652; S. C. 2 Bing. N. S. 528; S. C. 2 Scott, 813.

Non Pros.]—See *Rowles* v. *Bailey*, E. T. 1827, C. P., 1 M. & P. 2; *Twyning*, dem., *Lowndes*, ten., H. T. 1833, C. P., 9 Bing. 65; *Dumsday*, dem., *Hughes*, ten., T. T. 1836, C. P., 2 Scott, 377.

Nonsuit.]—See *Mason*, dem., *Sadler*, ten., M. T. 1835, C. P., 2 Bing. N. S. 323; 2 Scott, 510.

IV. RELATIVE TO THE EVIDENCE, p. 338.

V. RELATIVE TO THE COSTS, p. 339.

I. RELATIVE TO THE CIRCUMSTANCES NECESSARY TO CONSTITUTE THE OFFENCE*.

II. RELATIVE TO WHO MAY BE GUILTY OF†.

III. RELATIVE TO THE INDICTMENT‡.

IV. RELATIVE TO THE EVIDENCE§.

* It is not a "beginning to demolish" a house within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 8, unless the jury be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it. (*Rex* v. *Thomas*, 1830, N. P., 4 C. & P. 237). But, where the prisoners broke only the detached parts of a machine which had been taken to pieces:—Held, to be within the 7 & 8 Geo. 4, c. 30, s. 4. (*Rex* v. *Mackerel*, 1831, N. P., 4 C. & P. 448). So, where the water-wheel, the moving power of a threshing machine, was broken. (*Rex* v. *Fidler*, 1831, N. P., 4 C. & P. 450). And a riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the parties are guilty of the common-law offence, which is a misdemeanour; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. (*Rex* v. *Fursey*, T. T. 1833, N. P., 6 C. & P. 81). Where a party of coal-whippers, having a feeling of ill-will to a coal-lumper who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brick-bats, &c., and broke windows and partitions and part of a wall, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police:—Held, that they might be convicted of beginning to demolish, under the stat. of 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the coal-lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, though they had not any ill-will against the owner of the house personally. (*Rex* v. *Batt*, 1834, O. B., 6 C. & P. 329).

† All parties present at a prize-fight are equally liable for a riot and assault committed thereat, and, semble, justices may apprehend the combatants, and compel them to enter into sureties for the peace, and in default commit them. (*Rex* v. *Billingham*, 1825, N. P., 2 C. & P. 234).

‡ Where, in an indictment on 1 Geo. 1, st. 2, c. 5, s. 1, for remaining after the proclamation was read, it appeared that the concluding words "God save the King" had been omitted:—Held, that the charge could not be supported. (*Rex* v. *Child*, 1830, N. P., 4 C. & P. 442). So, if persons be charged with a riot and cutting down fences, and the indictment do not conclude in terrorem populi, they cannot, on that indictment, be convicted of a riot, but may be convicted of an unlawful assembly. (*Rex* v. *Cox*, 1831, N. P., 4 C. & P. 538).

Indictment for that the prisoners, being riotously, &c. assembled, &c. at the parish of A., feloniously did begin to demolish the house of the prosecutor, "situate at the parish aforesaid:"—Held sufficient, and that the parish must be taken to relate to the last-mentioned parish. (*Rex* v. *Richards*, 1832, N. P., 1 M. & Rob. 177).

§ If persons who had formed part of a mob obtain money from a party by advising him to give money to the mob, and be indicted for this as a robbery, the

V. RELATIVE TO THE COSTS*.

Robbery†. See also tits. *Indictment—Larceny.*

Rules, Motions, and Orders.

See, also, tit. *Judge's Order.*

I. RELATIVE TO THE 3 & 4 WILL. 4, p. 340.

II. RELATIVE TO THE INTITLING, p. 340.

III. RELATIVE TO THE DATE, p. 340.

IV. RELATIVE TO THE SERVICE, AND WAIVER OF.

(*a*) ON WHOM TO BE SERVED, p. 341.

(*b*) BY STICKING UP IN PUBLIC OFFICE, p. 341.

(*c*) IN CASE OF DEMAND OF MONEY, p. 341.

(*d*) ON SEVERAL DEFENDANTS, p. 341.

(*e*) WAIVER AND ACKNOWLEDGMENT OF, p. 341.

V. RELATIVE TO THE AFFIDAVIT, p. 342.

VI. RELATIVE TO PROCEEDINGS ON IN COURT, p. 342.

prosecutor to shew that this was not bonâ fide advice may give evidence of demands of money made by the same mob at other places before and afterwards in the course of the same day, if any of the prisoners were present on those occasions. (*Rex* v. *Winkworth*, 1830, N. P., 4 C. & P. 444).

* Upon an indictment for riot preferred at the sessions, and removed by the prosecutor into the King's Bench, and tried at N. P.:—Held, that no costs were allowable under the 7 Geo. 4, c. 64, s. 23. (*Rex* v. *Johnson*, 1827, 1 Moo. C. C. 173).

† On an indictment for robbery, the jury having found the prisoner guilty of an assault, but without any intention to commit any felony:—Held, that the prisoner might be convicted of the assault, and punished, under 7 Will. 4 & 1 Vict. c. 85, s. 1. (*Reg.* v. *Ellis*, 8 C. & P., N. P. 654). So, on an indictment for stealing from the person a pocket-book, which appeared never to have been removed from the prosecutor's person, but only raised up from the bottom of his pocket, six Judges against four were of opinion that it did not amount to a taking from the person, but all agreed that the offence of larceny was complete. (*Rex* v. *Thompson*, 1825, 1 Moody, C. C. 78). In a highway robbery, the force applied must be for the purpose of overpowering and preventing resistance, and not merely of getting possession of the property. (*Rex* v. *Gnosil*, 1824, N. P., 1 C. & P. 304).

A. and B., when riding in a gig together, were robbed at the same time, A. of his money, B. of his watch, and violence used towards both. There was an indictment for the robbing of A., and another indictment for the robbing of B.:—Held, that, on the trial of the first indictment, evidence might be given of the fact of the loss of the watch by B., and that it was found on one of the prisoners, but that no evidence ought to be given of any violence offered to B. by the robbers. (*Rex* v. *Rooney*, 1836, N. P., 7 C. & P. 517).

VII. RELATIVE TO ON WHOM BINDING, p. 343.

VIII. RELATIVE TO AMENDMENT OF, p. 343.

IX. RELATIVE TO BRINGING MONEY INTO COURT UNDER, p. 343.

X. RELATIVE TO ENLARGING, p. 343.

XI. RELATIVE TO RE-OPENING, p. 343.

XII. RELATIVE TO REVIVING, p. 343.

XIII. RELATIVE TO RESCINDING, p. 344.

XIV. RELATIVE TO COSTS ON, p. 344.

XV. RELATIVE TO SECOND RULE FOR SAME CAUSE, p. 344.

I. RELATIVE TO THE 3 & 4 WILL. 4.

MILLER, *dem.*, MILLER, *ten.*, M. T. 1835. C. P. 1 *Scott*, 387.

The Rules made under the 3 & 4 Will. 4, c. 42, do not apply to real actions nor revenue causes.

ON a rule calling on the demandant to shew cause why the count in the writ of right should not be set aside for irregularity. The objection was, that it was intitled as of Hilary Term, in the —— year of Will. 4, whereas, according to the first General Rule promulgated by the Judges under the authority of the 3 & 4 Will. 4, c. 42, s. 1, it should be intitled as of the day on which it was pleaded.

Per Cur.—The new Rules which the Judges of the various courts are empowered by the 3 & 4 Will. 4, c. 42, s. 1, to promulgate, apply only to those cases in which the courts have a common and concurrent jurisdiction. Neither is there anything in these which refers to the revenue laws, nor to proceedings with regard to crimes, subjects over which the Courts of King's Bench and Exchequer have peculiar jurisdiction. So with respect to writs of right in the Common Pleas.

II. RELATIVE TO THE INTITLING*.

III. RELATIVE TO THE DATE†.

IV. RELATIVE TO THE SERVICE‡, AND WAIVER OF.

* Rules of Court delivered out in vacation to state the day of the month and week, but to be intitled as of the term preceding. (*Reg. Gen.* M. T. 1837, C. P., 4 Bing. N. S. 367; S. R. 3 M. & W. 154; S. R. 3 N. & P. 2).

† Where a rule is applied for on one day, but, from the Court taking time to consider, it is not granted till another, it must be dated as of the former day. (*Egan* v. *Rowley*, M. T. 1839, B. C., 8 D. P. C. 145).

‡ A rule nisi to compute, served at York on the day cause was to be shewn, is insufficient to authorize making the rule absolute, although ten days have elapsed since the service. (*Farrell* v. *Dale*, E. T. 1833, Ex., 2 D. P. C. 15).

(*a*) On whom to be served*.

(*b*) By sticking up in public office†.

(*c*) In case of demand of money‡. See, also, tits. *Attachment—Arbitration.*

(*d*) On several defendants §.

(*e*) Waiver and acknowledgment of.

Levi *v.* Duncombe, H. T. 1835. Ex. 1 *C., M. & R.* 737; S. C. 3 *D. P. C.* 447.

Upon a rule nisi for an attachment for not obeying a Judge's order, made a rule of Court, not personally served, the party appeared, on the rule coming on, and objected to the want of personal service—

Appearing to a rule is a waiver of service‖.

The Court held, that was a waiver.

* Service of a rule nisi to compute on the mother of the defendant at his residence, held sufficient. (*Warren* v. *Smith*, M. T. 1833, Ex., 2 D. P. C. 216). So, it is sufficient to serve a rule nisi to compute on "a female in the habit of receiving messages for the defendant at his dwelling-house." (*Edwards* v. *Napier*, M. T. 1840, Q. B., 9 D. P. C. 177). Or on a female who is sworn to be part of the defendant's family, and who promises to give the copy rule to the defendant. (*Weeden* v. *Lipman*, M. T. 1840, B. C., 9 D. P. C. 111). But service on a warehouseman at defendant's place of business, (*Ibotson* v. *Phelps*, T. T. 1840, Ex., 8 D. P. C. 770; S. C. 6 M. & W. 626; S. P. *Castle* v. *Sowerby*, H. T. 1836, Ex., 4 D. P. C. 669), or on the defendant's landlady, is not sufficient. (*Gardner* v. *Green*, H. T. 1835, B. C., 3 D. P. C. 343). So, upon a female servant at chambers. (*Alanson* v. *Walker*, M. T. 1834, 3 D. P. C. 258).

† Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown; (*Wright* v. *Gardner*, E. T. 1835, Ex., 3 D. P. C. 657); and it will be confined to the particular rule sought to be served. (*Davies* v. *Jenner*, M. T. 1840, C. P., 9 D. P. C. 45). But service of a rule to compute allowed, by sticking up in the office, and serving on the general attorney of the defendant, where the party was abroad, had no place of residence in this country, and no attorney in the suit. (*Gibson* v. *Lord Ranelagh*, H. T. 1839, C. P. 7 Scott, 231).

‡ To bring the party into contempt for non-payment of money, pursuant to rule of Court, if the demand is made by power of attorney, a copy of the power must be left at the time of demand. (*Doe* d. *Cope* v. *Johnson*, H. T. 1839, B. C., 7 D. P. C. 550).

§ A rule nisi to compute principal and interest on a bill of exchange was made absolute, it having been served on one of two defendants by leaving the original, and a copy having been served on the other defendant. (*Grant* v. *Stoneham*, M. T. 1838, C. P., 7 D. P. C. 126).

‖ Where the rule and copy had been sent by the post, and the original was a few days afterwards received back, indorsed with a receipt of "copy of the within rule," and signed:—Held sufficient for making the rule absolute. (*Smith* v. *Campbell*, T. T. 1838, C. P., 6 D. P. C. 728).

V. RELATIVE TO THE AFFIDAVIT*. See also, ante, tit. *Affidavit.*

PERRING *v.* KYMER, H. T. 1835, K. B. 4 *N. & M.* 477.

The affidavit may be sworn after rule granted, and before drawn up.

COUNSEL had obtained a rule on facts stated in an affidavit, not at the time sworn, but which he had believed to be so at the time—

The Court allowed the rule to be drawn up as upon reading the affidavit, on the terms of its being sworn the same evening.

VI. RELATIVE TO PROCEEDINGS ON IN COURT†.

* In intitling an affidavit of service of a rule to compute, the Christian name of the plaintiff as well of the defendant must be introduced; (*Anderson* v. *Baker*, M. T. 1834, C. P., 3 D. P. C. 107); and where intitled only with the defendant's initial, it must be shewn that he so signed the bill on which the action was brought. (*Hilbert* v. *Wilkins*, M. T. 1839, B. C., 8 D. P. C. 139). And affidavits on a rule in two causes must be intitled in both, although the parties are the same; where intitled only in one, ordered to be re-sworn. (*Corry* v. *Wharton*, E. T. 1836, C. P., 2 Scott, 436).

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application. (*Rex* v. *Justices of Carnarvon*, T. T. 1835, K. B., 5 N. & M. 364).

An affidavit of service must swear to the service of the "rule annexed," and not merely of the "rule in this cause." (*Fidlett* v. *Bolton*, M. T. 1835, B. C., 4 D. P. C. 282; S. P. *Cooper* v. *Wheale*, M. T. 1835, B. C., 4 D. P. C. 281).

By Reg. Gen., M. T. 3 Will. 4, the affidavit of service shall mention the day of service.

Where a rule has been obtained on an affidavit which is defective, in not having a proper jurat, the party moving cannot, when cause is shewn, and the objection taken, remove the effect of it by producing a fresh affidavit, similar to the first, with a proper jurat; the proper way is to re-swear the original affidavit, and the Court will enlarge the rule for that purpose, or allow the new affidavit to be filed. (*Goodricke* v. *Turley*, M. T. 1835, Ex., 4 D. P. C. 392; 2 C., M. & R. 636–634; S. C. 1 Tyrw. & G. 146). An affidavit of service of a rule of Court upon an attorney, in which it is sworn that the service was effected by leaving a copy of the rule "with him at his house," and at the same time producing and shewing to him the original rule, is sufficient on a motion for an attachment for disobedience, although the word "personal," in allusion to the service, is not introduced into the affidavit. (*Short* v. *Smith*, E. T. 1840, C. P., 1 Scott, N. S. 153; S. C. 8 D. P. C. 584). A party cannot raise an objection to affidavits not referred to in the rule nisi. (*Naylor* v. *Eagar*, H. T. 1828, Ex., 2 Y. & J. 90).

Where a regular service of a rule is endeavoured to be dispensed with on the ground of absence, or otherwise, the affidavit must shew what efforts have been made to serve the party before secondary service will be allowed. (*Mudie* v. *Newman*, E. T. 1834, Ex., 2 D. P. C. 639).

† Parties on making applications to the Court may refer to the same affidavits as have been before used before a Judge at chambers. (*Pickford* v. *Ewington*, M. T. 1835, Ex., 1 Tyrw. & G. 29; S. C. 4 D. P. C. 453; S. P. *Worthington* v. *Prince*, 2 C., M. & R. 315; S. C. 4 D. P. C. 243). But a counsel, upon objection to his affidavits, must immediately elect to use them or not. (*Preedy* v. *Lovell*, M. T. 1836, B. C., 4 D. P. C. 671).

It is not a matter of right to shew cause against a rule in the first instance, although notice may have been given. (*Doe* v. *Smith*, E. T. 1838, Q. B., 3 N. & P. 335).

If a rule is drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging; but it may be revived. (*Smith* v. *Collier*, M. T. 1834, B. C., 3 D. P. C. 100). The Court refused to discharge a rule obtained on the ground of the affidavit being mistakenly intitled as to the plaintiff's

VII. RELATIVE TO ON WHOM BINDING.

THOMAS *v.* HEWES, H. T. 1834. Ex. 2 *C. & M.* 519; S. C. 4 *Tyrw.* 335.

An attorney, who consents to a rule without his client's sanction, binds his client.

IN an action against the steward of F., the attorney of F. had, after consulting with counsel, consented to an arrangement, which took place under an order of Nisi Prius, afterwards made a rule of Court—

The Court, upon a disavowal by F. of the authority of the attorney to bind him, refused to interfere in a summary way, the application being late, and it not being possible to put the plaintiff in the same situation.

VIII. RELATIVE TO THE AMENDMENT OF*.

IX. RELATIVE TO BRINGING MONEY INTO COURT UNDER†.

X. RELATIVE TO ENLARGING‡.

XI. RELATIVE TO RE-OPENING§.

XII. RELATIVE TO REVIVING‖.

Christian name, but allowed it to be amended and re-sworn. (*Cooper* v. *Talbot*, E. T. 1839, C. P., 7 Scott, 345).

A rule drawn up in one term to shew cause in another is put into the peremptory paper, and parties ought to be prepared to shew cause on the day for which the rule is drawn up, and not on the following day, as is usual in other cases. (*Warner* v. *Wood*, M. T. 1834, Ex., 3 D. P. C. 262).

* The Court will amend mistakes in drawing up rules on motion within the same, or, perhaps, following term; but, upon motion to open a rule, matter subsequent to the first rule must be shewn on affidavit. (*Lord* v. *Hope*, T. T. 1834, Ex., 5 Tyrw. 487).

† Where a rule nisi for a new trial is granted on the terms of bringing the amount of the verdict into Court, the money must be brought in before the rule nisi is drawn up. (*Clare* v. *Fiestel*, E. T. 1834, Ex., 2 D. P. C. 617).

‡ Where an enlarged rule requires affidavits to be filed within a limited time, the Court will not allow them to be filed afterwards, unless it is clearly shewn that the not filing of them arose from inevitable accident. (*Wright* v. *Lewis*, H.T. 1840, B. C., 8 D. P. C. 298). Time usually mentioned in enlarged rule, or when affidavits are to be filed in answer. (*Barker* v. *Richardson*, E. T. 1827, Ex., 1 Y. & J. 365, n.)

§ Where a rule had been disposed of, the Court refused to re-open the question on a suggestion of new facts, not brought before the Court, but known before the rule obtained. (*Bodfield* v. *Padmere*, H. T. 1837, K. B., 5 Ad. & E. 785, n.) So, the Court refused to open a rule obtained before a single Judge in the Bail Court in the term after the judgment pronounced, although with the sanction of the Judge. (*Todd* v. *Jeffery*, M. T. 1837, K. B., 2 N. & P. 443).

‖ Where a defendant resides such a distance from town that he cannot be served before the day for shewing cause, and the term expires on the day after that day, the rule can be revived in the next term. (*Rowbottom* v. *Ralphs*, H. T. 1838, B. C., 6 D. P. C. 291).

XIII. RELATIVE TO RESCINDING*.

XIV. RELATIVE TO COSTS†.

XV. RELATIVE TO SECOND RULE FOR SAME CAUSE‡.

Sale. See tits. *Auction and Auctioneer—Distress—Execution—Frauds, Statute of—Sheriff—Ship and Shipping—Vendor and Purchaser.*

Salvage. See tit. *Ship and Shipping.*

Satisfaction. See tits. *Accord and Satisfaction—Execution—Judgment—Payment.*

* The Court will not rescind its rule made upon a common rule upon the Master's suggestion as to the practice, although alleged to be erroneous. (*Gingell* v. *Bean*, M. T. 1840, C. P., 1 Scott, N. S. 390; S. C. 1 M. & G. 555; S. P. *Turner* v. *Gill*, M. T. 1834, B. C., 3 D. P. C. 30).

† In all cases (except of irregularity) rules moved with costs, and discharged generally, nothing being said as to costs, the successful party is not entitled to have them. (*Drinker* v. *Pascoe*, H. T. 1836, B. C., 4 D. P. C. 566). And it is resolved by the Judges, that when a Judge's order is made a rule of Court it shall be a part of the rule of Court that the costs of making the order a rule of Court shall be paid by the party against whom the order is made; provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed. (*Reg. Gen.*, E. T. 1840, Q. B., 3 P. & D. 678). And where a rule is discharged on a preliminary objection to the title of the affidavit supporting the rule obtained for setting aside proceedings on the ground of irregularity, the Court has discretion as to the costs of the application. (*Harris* v. *Matthews*, H. T. 1836, B. C., 4 D. P. C. 608). The Court will not entertain objections to the Master's taxation which are not specified in the affidavit or rule; and a party shewing cause against a rule, part of which is good, will not be entitled to the costs of the rule. (*Aliven* v. *Furnival*, E. T. 1833, Ex., 2 D. P. C. 49). So, where a rule to refer a matter to the prothonotary has been moved without costs, and the subject for inquiry is matter of fact only, the Court will not entertain a substantive application for costs of the inquiry after the report of the prothonotary is made. (*Holmes* v. *Edwards*, T. T. 1837, C. P., 6 D. P. C. 51). And where the defendant, on being arrested on a bill of exchange, paid the amount, with 10*l.* for costs, into the sheriff's hands, and the plaintiff obtained a rule absolute for taking it out of Court, but did not enter an appearance for the defendant, and a rule obtained by the latter for such payment (being deemed equivalent to bail) was afterwards discharged, no mention as to the costs being made in either of the rules:—Held, that the plaintiff was not entitled to the costs of either rule; the defendant afterwards obtained a rule for delivery up of the bill on payment of costs:—Held, that the plaintiff was entitled to the costs of the latter rule. (*Hannah* v. *Willis*, M. T. 1838, C. P., 5 Bing. N. S. 385).

‡ Where an application for a rule had been discharged, the Court discharged a second application with costs, it being the duty of the party applying to bring forward all the grounds to be relied on in the first instance. (*Rosset* v. *Hartley*, M. T. 1835, K. B., 5 N. & M. 415).

Savings Bank*.

CRISP *v.* BUNBURY, E. T. 1832. C. P. 8 *Bing.* 394.

THE plaintiff was a member of a savings bank society, whose clerk had absconded, having embezzled monies deposited, which the plaintiff and others were entitled to receive.

A depositor must proceed for the recovery of his money in manner pointed out by stat. 9 Geo. 4, c. 92.

The Court held, that, since 9 Geo. 4, c. 92, the plaintiff was barred from maintaining any action against the trustees, but could only pursue the remedy given by the statute,—viz. by arbitration.

REX *v.* WITHAM'S SAVINGS BANK, E. T. 1836. K. B. 3 *N. & M.* 417; S. C. 1 *Ad. & E.* 321.

DISPUTES had arisen among the members of the club, and the applicants, who, it was said on one side, had been expelled by order of magistrates, claimed to be stewards of the society, and alleged that the order of magistrates was void.

Where several depositors, they cannot have an arbitrator under 9 Geo. 4, unless all concur†.

The Court refused to grant a mandamus to appoint an arbitrator under the 45th section of 9 Geo. 4, c. 92. Where a number of individuals jointly deposit one sum in a savings bank, the whole, or a majority, must concur in applying for it before this Court will grant a mandamus to appoint an arbitrator.

Sacrilege‡.

Scavenger.

FILBEY *v.* COOMBE, M. T. 1837. Ex. 2 *M. & W.* 677.

BY 57 Geo. 3. c. 29, the scavenger is authorized to take away cinders, &c., considered by the owner as rubbish. Where coal, used in his trade, was only partially burned, and he removed it to other premises to be used for other purposes—

Under 57 Geo. 3, the scavenger is entitled only to take away cinders treated by the owner as rubbish.

The Court held he was entitled so to do.

* Regulated by 9 Geo. 4, c. 92.

† In case of embezzlement, no action lies against the trustees, the remedy being by arbitration, under 9 Geo. 4, c. 92. (*Rex* v. *Mildenhall Savings Bank*, M. T. 1837, K. B., 2 N. & P. 278).

‡ Stealing property from the tower communicating with the church by an internal door, held to be sacrilege within 7 & 8 Geo. 4, c. 29, s. 10. (*Rex* v. *Wheeler*, 1829, N. P., 3 C. & P. 585).

A prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 10, for breaking and entering a chapel, and stealing several fixtures, and a bell not fixed. It appeared that the chapel was a Wesleyan chapel, and not a chapel of the church of England:—Held, that the case must be confined to the act of simple larceny for stealing the bell. (*Rex* v. *Nixon*, 1836, C. C. C., 7 C. & P. 442).

School and Schoolmaster*. See, also, tit. *Imprisonment.*

Scire Facias.

See tits. *Bail—Judgment—Recognizance.*

I. RELATIVE TO WHEN IT LIES, p. 347.

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* In an action for a quarter's salary for taking away a child from school without a quarter's notice, evidence was given, on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—Held, that this evidence was not admissible; but that the witness might be asked whether she had ever received any prospectus when her children came home for the holidays. (*Delamotte* v. *Lane*, 1840, N. P., 9 C. & P. 261).

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—Held, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle. (*Darnell* v. *Tratt*, T. T. 1825, N. P., 2 C. & P. 82).

A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar. (*Clements* v. *Williams*, E. T. 1837, N. P., 8 C. & P. 58).

I. RELATIVE TO WHEN IT LIES*.

II. RELATIVE TO THE FORM OF†.

III. RELATIVE TO THE MOTION FOR‡.

IV. RELATIVE TO THE NOTICE OF, SUMMONS, AND SERVICE §.

V. RELATIVE TO THE APPEARANCE‖.

VI. RELATIVE TO THE RETURN ¶.

VII. RELATIVE TO TWO WRITS OF SCI. FA**.

* Quære, whether a sci. fa. will lie on an interlocutory judgment. The Court refused to entertain the matter on motion. (*Benn* v. *Greatwood*, M. T. 1838, C. P., 6 Scott, 891).

† Since the 2 Will. 4, c. 39, it is irregular for the sci. fa. to recite the action as commenced "by bill without our writ;" where commenced by summons, should state that the bail has been put in on a day previous to the issuing of the writ; but where it was tested on the 3rd of November, returnable on the 15th of November next ensuing, held immaterial. (*Peacock* v. *Day*, H. T. 1835, B. C., 3 D. P. C. 291).

A writ of sci. fa. cannot be tested in vacation, notwithstanding the provisions of sect. 12 of the Uniformity of Process Act. (*Seaton* v. *Heap*, M. T. 1836, B. C., 5 D. P. C. 247).

Proceedings in sci. fa. on a judgment are within 1 Reg. Gen., H. T. 4 Will. 4, (pleading rules), and, consequently, must be intitled of a day certain instead of a term. (*Collins* v. *Beaumont*, T. T. 1837, B. C., 5 D. P. C. 700).

‡ By Reg. Gen., H. T. 2 Will. 4, "A sci. fa. to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation, nor, if more than fifteen, without a rule to shew cause."

§ Where several attempts were made to summon a defendant on a sci. fa. returnable on the 28th of April, and eight days had elapsed after the return of the writ, an application, on the 5th of November, to sign judgment, was held too late without summoning the defendant again. (*Wood* v. *Moseley*, M. T. 1832, K. B., 1 D. P. C. 513). But the Court will permit judgment to be signed on a sci. fa. after eight days from the return, where the defendant resides abroad, he having had reasonable notice of the proceeding. (*Weatherhead* v. *Landless*, T. T. 1836, C. P., 3 Scott, 406; S. C. 5 D. P. C. 189).

A rule nisi to revive a judgment against the executors of a deceased defendant must be served on all the executors who have proved the will. (*Panter* v. *Seaman*, M. T. 1835, K. B., 5 N. & M. 679).

‖ By Reg. Gen., H. T. 2 Will. 4, "No judgment shall be signed for non-appearance to a scire facias without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed, by leave, after eight days from the return of one sci. fa."

"A notice in writing to the plaintiff, his attorney, or agent shall be a sufficient appearance by the bail, or defendant, on a sci. fa." (*Reg. Gen.*, H. T. 2 Will. 4).

¶ Upon a rule calling on the sheriff to return a writ of sci. fa. with a return of nihil, which had been refused until a certain fee had been paid, which the Court deemed improper, the Court discharged the rule without costs, with a view to discourage the practice of ordering returns of nihil. (*Beddington* v. *Beddington*, M. T. 1828, C. P., 5 Bing. 284).

** Though two writs of sci. fa. on a judgment have been issued previously to the rule of H. T. 2 Will. 4, which requires notice to be given to the bail, still judgment cannot be signed on such writs of sci. fa. without complying with that

VIII. RELATIVE TO PLEAS IN.

SHAW *v.* LORD ALVANLEY, M. T. 1824. C. P. 2 *Bing.* 325.

Defendant may obtain leave to plead several matters to sci. fa. on judgment*.

UPON a sci. fa. on a judgment, the defendant having moved to plead several matters, viz., first, payment; secondly, that the judgment was fraudulent; thirdly, that the judgment was on a warrant of attorney fraudulently obtained—

The Court refused to allow the three pleas, and put the defendant to his election, observing, they had a discretion on such occasions.

IX. RELATIVE TO DEMURRERS†.

X. RELATIVE TO JUDGMENT‡.

XI. RELATIVE TO COSTS ON §.

XII. RELATIVE TO THE AMENDMENT OF ‖.

XIII. RELATIVE TO QUASHING ¶.

rule; and giving a rule for appearance is not sufficient. (*Kennedy* v. *Lord Oxford*, M. T. 1832, Ex., 1 D. P. C. 613). After returns nihil to a sci. fa. judgment cannot be signed, unless efforts to serve be shewn. (*Sabine* v. *Field*, H. T. 1833, Ex., 1 C. & M. 466).

* Plea to sci. fa. of a writ of error pending is clearly bad. (*Snook* v. *Mallock*, T. T. 1836, K. B., 5 Ad. & E. 279).

† It is not necessary for a party in a sci. fa. to return the demurrer book, and, therefore, a judgment signed for not returning it is irregular. (*Baylis* v. *Hayward*, E. T. 1835, B. C., 3 D. P. C. 533).

‡ Upon a motion to reverse a judgment by sci. fa.:—Held, that it could not be impeached on opposing the motion, which could only be done on a separate application. (*Thomas* v. *Williams*, E. T. 1835, Ex., 3 D. P. C. 655). Upon a plea of nul tiel record to a declaration in a scire facias in the Exchequer, on a judgment obtained in the Court of Great Sessions in Wales, before the passing of the 11 Geo. 4 & 1 Will. 4, c. 70, the plaintiff is entitled to the judgment of the Court upon procuring the certificate, and affidavit of the record being in the hands of the officer, in pursuance of the Rules of M. T. 1 Will. 4, though the actual judgment is not in Court. (*Howell* v. *Brown*, E. T. 1835, Ex., 3 D. P. C. 805).

§ By 3 & 4 Will. 4, c. 42, s. 34, it is enacted, "That in all writs of sci. fa. the plaintiff, obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined, in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

‖ The Court allowed writs of scire facias, issued in a different Christian name from that stated in the judgment, to be amended, by altering it to the one stated in the judgment, although the ca. sa. had been executed and returned. (*Thorpe* v. *Hook*, M. T. 1832, B. C., 1 D. P. C. 501).

¶ By Reg. Gen., H. T. 2 Will. 4, "a plaintiff shall not be allowed a rule to quash his own writ of scire facias after a defendant has appeared, except on payment of costs." The rule for quashing a sci. fa. at the suggestion of a plaintiff himself is nisi in the first instance; the Court will not in such a case make the payment of costs of a cassetur breve in an action brought on the judgment during the pendency of the sci. fa. a condition precedent. (*Oliverson* v. *Latour*, E. T. 1839, B. C., 7 D. P. C. 605).

Scotland*.

Sea, Inroads of. See tit. *Sewers.*

Sea Shore†.

Sea-Wall‡.

Seamen. See tit. *Ship and Shipping.*

Secondary Evidence. See tit. *Evidence.*

Second Arrest. See tit. *Arrest.*

Security for Costs. See tit. *Costs.*

Seduction.

HARRIS *v.* BUTLER, M. T. 1837. Ex. 2 *M. & W.* 539.

A parent cannot maintain an action for seduction of his daughter by defendant, while

THE plaintiff's daughter had been apprenticed as a milliner to the defendant's wife, and had been, during the term, seduced by the defendant. On demurrer—

The Court held, that, not being constructively in the service of the father, the action could not be maintained, the declaration con-

* A discharge of an insolvent debtor upon a cessio bonorum by the Court of Session in Scotland is no answer to an action brought by an English subject in a court in this country to recover a debt contracted in England, although it appeared that the plaintiff opposed the discharge of the defendant in the Scottish Court. Semble, that it would have been an answer to an action if the plaintiff had claimed to have the benefit of the Scotch law, and to take a distributive share of the property of the insolvent. (*Phillips* v. *Allan*, T. T. 1828, K. B. 8 B. & C. 477).

† Land down to high-water mark on the sea shore will be presumed to belong to the owner of the adjoining land, until the contrary appear. (*Lowe* v. *Govett*, T. T. 1832, K. B., 3 B. & Ad. 863). Slow and gradual accretions of soil will justify a jury in finding that the accretion was imperceptible. (*Rex* v. *Lord Yarborough*, T. T. 1824, K. B., 3 B. & C. 91; S. C. 4 D. & R. 790).

‡ The liability to repair a sea-wall, ratione tenuræ, may not be limited to such as are sufficient to resist ordinary tides and weather; and the orders of commissioners, made long back, are admissible evidence of the extent of the liability of those who are bound by precedent, prescription, customs, and tenures. (*Reg.* v. *Leigh*, T. T. 1839, K. B., 2 P. & D. 357).

in his wife's service*.

taining no averment on which a contract to take care of the morals of the child could be implied.

CARPENTER *v.* WALL, E. T. 1840. Q. B. 11 *A. & E.* 803; S. C. 3 *P. & D.* 457.

General evidence of looseness of character is admissible†.

IN an action on the case, for seduction of the plaintiff's daughter, the latter being called and asked, in cross-examination, whether she knew a particular person, which she denied—

The Court held, that the defendant could not call evidence to contradict her, by shewing statements made by her as to that person, she not having been asked whether she had made such statements; but general evidence as to the looseness of character is admissible.

Sequestration.

WAITE *v.* BISHOP, M. T. 1834. Ex. 1 *C., M. & R.* 507; S. C. 3 *D. P. C.* 234; S. C. 4 *Tyrw.* 90.

The writ of sequestration is not retrospective‡.

A RECTOR had commenced actions against his parishioners for non-payment of his tithes, and sometime afterwards his assignees, under an adjudication of the Insolvent Debtors' Court, obtained a sequestration against his benefice.

The Court held, that they could not, by virtue of their sequestration, claim the arrears so sued for by him; but that he was entitled to those arrears.

* An uncle may maintain an action for seducing his niece, living with him at the time, and performing offices of service in his house, no servant being kept; and, notwithstanding, on coming of age, she may be entitled to property; her illness, and receiving medical attendance in his house, held sufficient to raise the presumption of loss of service; in the case of uncle and niece it being requisite to raise also the relation of master and servant. (*Manvell* v. *Thomson*, T. T. 1826, N. P., 2 C. & P. 303), A. occupied two farms seven miles distant from each other. A. resided at one, and his son and daughter at the other. The daughter acted as mistress of the house at the latter, and had the poultry for her own benefit:—Held, that she was sufficiently the servant of A. for him to maintain an action for her seduction. It is not absolutely essential to prove actual service by the daughter; it is sufficient if she was under the controul of her father. (*Holloway* v. *Abell*, 1834, N. P., 7 C. & P. 528). The right to the service seems sufficient. (*Maunder* v. *Venn*, 1829, N. P., 1 M. & M. 323). But, in a subsequent case, it was held, that, to support an action for seducing the plaintiff's daughter per quod servitium amisit, there must be either an actual or constructive service. (*Blaymire* v. *Haley*, H. T. 1840, Ex., 6 M. & W. 55).

† In an action for seduction of the plaintiff's daughter, the defendant may examine witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses, who may each be asked as to the fact, and the time and place of its occurrence; but, if the jury are of opinion that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child, the plaintiff is entitled to the verdict, and the evidence of her unchastity with others is only to be considered in mitigation of damages. (*Verry* v. *Watkins*, 1836, N. P., 7 C. & P. 308).

‡ Upon an outlawry in mesne process, the sheriff, to a capias utlagatum, returned that the defendant was a beneficed clergyman, having no lay fee, but that he was a rector of a rectory:—The Court, upon motion, ordered a writ of sequestration to be issued to the bishop. (*Rex* v. *Armstrong*, E. T. 1835, Ex., 3 D. P. C. 760). The trustees of a sequestered estate in Scotland cannot sue in England in

PACK *v.* TARPLEY, H. T. 1839, Q. B. 1 *P. & D.* 478; S. C. 9 *Ad. & E.* 468.

A sequestration is a charge within 18 Geo. 2, c. 20, as to qualification for justice of the peace.

IN debt for penalties, under 18 Geo. 2, c. 20, for acting as a justice without being duly qualified, the defendant being vicar of a living under sequestration, but residing in the vicarage house—

The Court held, 1st, that a sequestration is a charge within the act; and that it is immaterial how the sequestrator has disposed of the profits, and that the receipt by the vicar of the stipend assigned is not a freehold qualification, being held not as vicar, but under the bishop's license; and, 2ndly, that production of the judgment roll and writ of sequestration, was sufficient evidence of the sequestration, although the writ was not awarded on the entry.

Serjeant-at-Law*.

See ante, tit. *Counsel.*

Serjeants' Inn†.

Sessions‡.

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their own names. (*Jeffery* v. *M'Taggart*, E. T. 1817, K. B., 6 M. & Selw. 126). Under 54 Geo. 3, c. 137, a sequestration in Scotland operates equally against creditors in respect of debts contracted in England as in Scotland. (*Sidaway* v. *Hay*, T. T. 1824, K. B., 3 B. & C. 12; S. C. 4 D. & R. 658). A writ of sequestration having been erroneously returned by the bishop before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the bishop, directing him to certify to the Court what he had done under it. (*Alderton* v. *St. Aubyn*, H. T. 1840, Ex., 6 M. & W. 150). Not necessary that publication should be made before the returns of the levari facias, nor absolutely necessary to fix a copy on the church door. (*Bennett* v. *Apperley*, E. T. 1827, K. B., 6 B. & C. 630).

* Warrants may now issue for conferring this privilege in vacation, 6 Geo. 4, c. 95.

† This Inn is extra-parochial. (*Lens* v. *Brown*, H. T. 1824, N. P., 1 C. & P. 224).

‡ Divisions in which special sessions to be held, regulated by 9 Geo. 4, c. 47.

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XI. RELATIVE TO APPEALS.

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I. RELATIVE TO BY WHOM HELD, AND JURISDICTION OF JUSTICES.

REX *v.* GUDRIGE, E. T. 1826. K. B. 5 *B. & C.* 459; S. C. 8 *D. & R.* 217.

Justices should not interfere where interested, and if they do the certiorari will be quashed*.

UPON an appeal against a rate, one of the magistrates, who was a rated inhabitant, had voted for granting a case, although he had refused to vote on the decision of the appeal—

The Court, holding it safer that magistrates should not interfere at all in cases where they are interested, quashed the writ of certiorari.

* An indictment for forgery, found at the quarter sessions, is a nullity; therefore, where indictments for forging requests for the delivery of goods had been found, and transmitted to the assizes, the Judge ordered that they should be quashed, and new indictments prepared at the assizes. (*Reg.* v. *Rigby*, 1839, N. P., 8 C. & P. 770).

Where the pauper's examination differs from his evidence at sessions as to any circumstance, making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material, within stat. 4 & 5 Will. 4, c. 76, s. 81. (*Reg.* v. *Justices of West Riding, Yorkshire,* E. T. 1840, Q. B., 3 P. & D. 462; S. C. 10 Ad. & E. 685).

REX *v.* JUSTICES OF HERTFORDSHIRE, H. T. 1833. K. B. 1 *N. & M.* 331.

AN appeal was, after argument, respited upon payment of costs, and the order recited the notice of appeal.

The Court held, that, the respondents having admitted the jurisdiction of the Court, they could not afterwards dispute it, and compel the appellant to prove notice of appeal.

But after admission of jurisdiction it cannot be disputed.

REX *v.* JUSTICES OF MONMOUTHSHIRE, M. T. 1825. K. B. 4 *B. & C.* 844; S. C. 6 *D. & R.* 334.

UPON an appeal against an order of removal, the justices at sessions were equally divided in opinion upon a question of fact on which the settlement of the pauper depended. The sessions, thinking that it lay on the respondents' parish to establish their case to the satisfaction of a majority of the Court, quashed the order of removal. The sessions having decided the case—

The Court of King's Bench refused a mandamus. It seems, the sessions ought to have adjourned instead of quashing the order.

Where justices equally divided on an appeal, they should adjourn the appeal.

REG. *v.* INHABITANTS OF BRIDGEWATER, E. T. 1839. Q. B. 2 *P. & D.* 586.

A BOROUGH not co-extensive with the parish, before the passing of the 5 & 6 Will. 4, c. 76, had a quarter sessions, with jurisdiction over the parish; but by that act parts of the parish were thrown into the county, and parts of adjoining parishes included within the borough:—Held, that, not having six justices appointed, the parish had the power of appealing against a rate to the county sessions.

Under 5 & 6 Will. 4, there can be no appeal to the sessions unless there be a requisite number of justices.

REX *v.* INHABITANTS OF RICKINGHALL SUPERIOR, M. T. 1832. K. B. 1 *N. & M.* 47.

THE facts stated in a special case did not substantially warrant the finding of the sessions, but the judgment was such as the Court would have pronounced, and they would have confirmed the order of sessions—

The Court, therefore, refused to interfere.

If the facts warrant the finding, it is good;

REX *v.* INHABITANTS OF TILLINGHAM, T. T. 1830. K. B. 1 *B. & Ad.* 180.

A MAN, being settled in one parish, was residing in another, and applied for relief to the parish to which he belonged, and the parish officers advanced him money to pay his rent, the effect of which payment would be to cause him to be settled in the parish in which he was then residing.

The Court held, that this fact would not prevent the gaining of the settlement, unless the transaction was fraudulent; and that the question by which fraud or no fraud was to be tried, was this:—"Was the money advanced by the parish officers to assist the man, and enable him to go on, or was it done merely to throw him off one parish to another?" And the case was sent back to the sessions for them to dispose of by the application of this principle.

but the sessions are bound to find or negative fraud*.

* Fraud must be expressly found by the sessions: the Queen's Bench will not infer it. (*Rex* v. *Inhabitants of Llanfihangel Abercowin*, H. T. 1835, K. B., 4 N. & M. 355).

REX *v.* ST. JAMES, WESTMINSTER, M. T. 1834. K. B. 4 *N. & M.* 252.

Where a party aggrieved is entitled to appeal to the sessions, after application to the justices, the justices have the same power.

A LOCAL act gave a party aggrieved by a rate power of applying to two justices, and if not relieved that then he should pay the rate, and might appeal to the sessions, who might order to be repaid so much as should appear to them to have been overpaid.

The Court held, that, as there were no means of reaching the sessions unless the party had failed in obtaining relief from the two justices, it must be necessarily implied that they had power to relieve against any complaint against the rate, and it was no objection that they had done so upon considering the rate erroneous in principle.

REX *v.* INHABITANTS OF ALL SAINTS, SOUTHAMPTON, H. T. 1828. K. B. 7 *B. & C.* 785.

Under the Mutiny Act, the only justices who can inquire into the settlement of soldiers are those who reside in the parish where the soldiers are quartered.

ON a case from the sessions—

The Court held, that an examination of a soldier, as to his place of settlement, taken under the Mutiny Act, ought to shew upon the oath of the deponent that he is a soldier, and is quartered within the jurisdiction of the justices who take the examination; or if those facts do not appear upon the face of the examination, they must be shewn by evidence aliunde, before the examination can be admitted in evidence. Those facts essential to the jurisdiction of the justices were not allowed to be presumed in favour of the examination, though it had been taken forty-five years before the time when it was tendered in evidence.

REX *v.* JUSTICES OF MIDDLESEX, E. T. 1840. Q. B. 11 *Ad. & E.* 809; S. C. 3 *P. & D.* 459.

The justices making the order have no power after appeal*.

AFTER an appeal against an order of removal had been entered, and notice of trial given—

The Court held, that the power of the justices making the order was at an end, and that they had no power to suspend the order at the instance of the respondents.

II. RELATIVE TO THE TIME OF HOLDING†.

* The sessions found that A. hired and paid for lodgings for the pauper in Dale; that the pauper came to Dale, and resided in the lodgings for a week, married, and continued afterwards to reside in the lodgings until his removal under the order appealed against:—Held, (per *Patteson*, J., and *Williams*, J., dissentiente *Coleridge*, J.), that a finding by the sessions, that the pauper did not come to settle in Dale, within the meaning of 13 & 14 Car. 2, c. 2, was repugnant to the facts found, and was therefore necessarily wrong. (*Rex* v. *Inhabitants of Woolpit*, M. T. 1835, K. B., 5 N. & M. 526). So, it is a question for the sessions whether a contract be one of hiring or apprenticeship, the test being, what was the object of the parties? if that be of one to teach, and the other to learn, it will be a contract of apprenticeship; and it is not necessary that the words "teach," or "learn," should be expressly used. (*Rex* v. *Great Wishford*, M. T. 1835, K. B., 5 N. & M. 540).

† The justices of Middlesex, in addition to the four quarter and four general general sessions which they had been previously in the habit of holding, appointed other original intermediate sessions:—Held, that they had a right so to do; and that an indictment found at one such additional sessions was valid in point of law. (*Rex* v. *Mullaney*, 1834, O. B., 6 C. & P. 96). The 54 Geo. 3, c. 84, as well as 2 Hen. 5, are only directory as to the time of holding the quarter sessions. (*Rex* v. *Justices of Leicester*, T. T. 1827, K. B., 7 B. & C. 6).

III. RELATIVE TO NOTICE OF TRIAL.

REX *v.* YORK, WEST RIDING, JUSTICES OF, M. T. 1833. K. B. 5 *B. & Ad.* 667.—S. P. REX *v.* JUSTICES OF BUCKS, H. T. 1834. K. B. 6 *D. & R.* 142.

No new notice required after respite.

BY the 1 Will. 4, for inclosing the lands of the manor of Metham, the commissioners for that purpose are to keep true accounts of all sums received and expended; by the 20th section an appeal is given to the party grieved, on giving ten days' notice. A party grieved appealed, and gave the ten days' notice which was required by the act. The appeal was then respited to the next sessions. On its being called on at the next sessions the appellant was called on to prove a notice of appeal for those sessions, and being unable to do so, the appeal was struck out.

The Court held, that there was no necessity for notice of the respited appeal.

IV. RELATIVE TO EVIDENCE*.

V. RELATIVE TO AMENDING THE ORDER.

REX *v.* JUSTICES OF CHESHIRE, M. T. 1833. K. B. 2 *N. & M.* 827; S. C. 5 *B. & Ad.* 439.

The justices connot amend an order made under 11 Geo. 2.

THE 11 Geo. 2, c. 19, s. 4, inflicting penalties for fraudulent removal of goods to prevent distress, directing the adjudication of the justices to be by an order—

The Court held, that it could not be returned to the sessions in an amended form, and that the party had a right to appeal against it in the form originally made.

VI. RELATIVE TO THE ADJOURNMENT AND RESPITE.

BACKE, *Ex parte*, M. T. 1832. K. B. 3 *B. & Ad.* 704.

The sessions may refuse to postpone the hearing†;

THE sessions had refused an application to postpone the hearing on an appeal, upon grounds laid before them—

The Court refused a mandamus, it being a question peculiarly for their decision.

* The sessions receiving inadmissible evidence is no ground for the interference of the superior Court, unless the sessions send a case. (*Rex* v. *Frieston*, M. T. 1833, K. B., 5 B. & Ad. 597). The production of the sessions-book is not sufficient proof that the appeal came on to be heard; and a regular record must be made upon parchment, the same as on a return to a certiorari, and that record or an examined copy must be produced. (*Rex* v. *Ward*, 1834, N. P., 6 C. & P. 366).

† A party cannot be legally convicted upon an indictment found by the grand jury upon the testimony of witnesses, who were sworn by an officer of the Court after the sessions had lapsed, in consequence of its having on two successive days

REX *v.* JUSTICES OF MONMOUTH, H. T. 1831. K. B. 1 *B. & Ad.* 895.

as the justices have a discretionary power;

NOTICE was given of an intention to enter and try an appeal at the next sessions; but, at the sessions, the appellants found they could not try by reason of the absence of a material witness. The parties who were to be respondents had come prepared to try. A motion was made, upon affidavit, to enter and adjourn the appeal. The sessions would not accede to this, except upon the terms of paying the costs of the day to the other side. This was refused, and the appeal was not entered.

The Court held, that the sessions were right, and refused to order the appeal to be then received.

REX *v.* USKE, E. T. 1828. K. B. 2 *M. & Ry.* 172; S. C., *by name* REX *v.* JUSTICES OF MONMOUTH, 8 *B. & C.* 137.

and the Court will not inquire into the order to adjourn.

THE hearing of an appeal was on an equality of votes adjourned. The Court refused an order nisi for a certiorari on the ground of one of the justices who joined in the order of adjournment, and originally made the order of removal, being a rated inhabitant. The Court could not act as a court of error, and inquire whether the order for adjournment was properly made.

REX *v.* JUSTICES OF NORFOLK, H. T. 1834. K. B. 3 *N. & M.* 55.

But practice at the sessions, that notice of respite is to be given, cannot be sustained.

A RULE of quarter sessions required, "that, whenever an appeal against an order should be entered and respited, notice thereof should, within one calendar month after such entry and respite, be given to the officers of the removing parish;" and where the sessions, upon that rule not having been complied with, confirmed the order, without going into the merits—

This Court granted a mandamus to enter continuances and hear the appeal, on the ground that the practice was illegal.

VII. RELATIVE TO CONTINUANCES*.

been opened and adjourned without the presence of any justice. (*In re Clerkenwell*, 1833, N. P., 6 C. & P. 90). The 9 Geo. 1, c. 7, s. 8, only applies to the first sessions after executing the order of removal, and therefore the Court will not interfere with the discretion of the magistrates at the second as to adjournment, if it is in the furtherance of a reasonable practice. (*Rex* v. *Justices of Monmouthshire*, H. T. 1835, B. C., 3 D. P. C. 306).

* Where the sessions have granted a special case, which has not been settled for more than six months after being granted, the certiorari for removing the orders of magistrates and sessions must be sued out within six months from the time of granting the case. If it is not so sued out, this Court will not grant a mandamus to compel the sessions to enter continuances and hear the appeal. (*Rex* v. *Justices of Staffordshire*, M. T. 1832, B. C., 1 D. P. C. 484).

VIII. RELATIVE TO SENDING CASE BACK.

REX *v.* MATLOCK, T. T. 1833. K. B. 5 *B. & Ad.* 883.

Not according with facts, no ground for sending case back.

THE case returned upon the certiorari appeared to be signed by the Chairman.

The Court refused an application to send it back to be re-stated, upon a mere suggestion that the chairman did not recollect settling the case, and that it did not accord with the facts proved.

IX. RELATIVE TO REMANETS*.

X. RELATIVE TO CASES FROM†.

XI. RELATIVE TO APPEALS‡.

(*a*) WHO MAY APPEAL.

REX *v.* BISHOP WEARMOUTH, H. T. 1834. K. B. 3 *N. & M.* 77.

The parish officers, though bound by an order, may appeal ||.

CERTAIN paupers being settled in P., a township of the parish of B. W., were removed by an order directed to the parish of B. W., which, for the purpose of relief of the poor, had no existence. The

* Where the appeal was, by press of business, made a remanet, and before the next sessions a fresh and varying statement of the grounds of appeal was given:—Held, that the sessions were bound to hear the appeal on the latter statement. (*Rex* v. *Justices of Derbyshire*, 3 N. & P. 591).

† Where the sessions lay before the Court a written document, it is a question of law as to what is its effect; where the hiring and service are made vivâ voce, it is a question of fact; and the Court cannot attend to any thing which takes place at the sessions which is not stated in the case, as whether conversations at the time of the contract were receivable or not. (*Rex* v. *Billingsley*, T. T. 1836, K. B., 1 N. & P. 149).

‡ As to poor-rates, see 4 Vict. c. 48.

Although a notice of appeal, given according to the rule or practice of the particular court of quarter sessions, will be sufficient to enable the appellant to try his appeal, it may not be sufficient to prevent the pauper from being removed to the appellant parish. By the recent Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 79), after directing that the pauper shall not be removed until after twenty-one days' notice of his being chargeable, and a copy of the order of removal, and a copy of the examination on which the order was made, shall have been sent to the overseers of the parish to whom such order shall be directed, it is provided, that, "if notice of appeal against such order of removal shall be received by the overseers of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal." And the same statute (s. 81) requires that a statement of the grounds of appeal shall be sent or delivered to the overseers of the removing parish fourteen days at least before the first day of the sessions; if such statement form a part of the notice of appeal, the notice must be given accordingly; or if the rule of the sessions require a longer notice, then in conformity with the rule of the sessions.

|| It is not competent for rate payers to appeal against an order of removal, the parish officers being the proper parties, and to represent the parish in such matters. (*Reg.* v. *Colbeck*, E. T. 1840, Q. B., 3 P. & D. 488).

order was served upon the officers of P., who refused to receive the paupers, and who were then taken to the churchwarden of the parish, who took them to the township of B. W.

The Court held, that the latter were entitled to the appeal, although they might be bound by the order to maintain the paupers, (dub. *Taunton*, J., and *Patteson*, J.).

(*b*) To what sessions.

Rex *v.* Justices of Wilts, T. T. 1828. K. B. 8 *B. & C.* 380.

If an appeal be received, though too late, it must be heard*.

The rate was made and published on the 16th September, and the appeal was entered and adjourned by the justices at the Middlesex sessions, as a matter of course, to the Epiphany, no notice of appeal having been given; but the defendant gave notice of his intention to try such appeal at the latter sessions, when the justices refused to hear it.

The Court held, that, although they might have refused to have received the appeal at the Michaelmas sessions, unless there had been proof of notice of appeal given, yet, that having received and adjourned it, they were bound to hear it at the following sessions; and a mandamus was therefore granted, disapproving, however, of the practice of adjourning appeals as matter of course.

Rex *v.* Justices of Salop, E. T. 1831. K. B. 2 *B. & Ad.* 145.

There may be an appeal to the sessions after an adjournment by the guardians of the poor.

A local act, establishing guardians of the poor, directed them to hold courts at which objections by rate payers should be heard, and if not then settled to the satisfaction of the objecting party, the matter should be adjourned to the next meeting, and be then finally heard and determined; the act also gave an appeal to the quarter sessions within four calendar months after the cause of complaint

* A poor-rate was published on the 14th of October, and the next sessions took place on the 23rd. Nothing was done at those sessions by the appellant; but, at the January sessions, an appeal was entered and respited. Notice of appeal was given for the following Easter sessions, when the justices refused to hear the appeal. The Court made a rule absolute for a mandamus to compel them to hear it. (*Reg.* v. *Justices of Suffolk*, T. T. 1840, B. C., 8 D. P. C. 618).

A parish is not "aggrieved," within the meaning of the 13 & 14 Car. 2, c. 12, s. 2, notwithstanding the 4 & 5 Will. 4, c. 76, ss. 79, 84, until the actual removal of the pauper; and, therefore, an appeal to the sessions next after the removal is sufficiently early. (*Reg.* v. *Justices of Salop*, M. T. 1837, B. C., 6 D. P. C. 28).

Before the passing of stat. 5 & 6 Will. 4, c. 76, (Municipal Corporation Act), the borough of B. had a quarter sessions and four justices, but no non-intromittant clause. The parish of B. was wholly within the jurisdiction of the borough justices, though part only was within the borough; and both parish and borough were within the county of S. By the operation of that act part only of the parish was included within the new boundary of the borough, and neither the recorder nor the borough justices had any jurisdiction over the rest of the parish. Since that act there were separate quarter sessions, and seven justices for the borough. The overseers of the parish made one poor-rate for the whole, which was duly allowed by justices, both of the county and borough. An inhabitant and occupier of land in the part out of the borough appealed against the rate on the ground that certain inhabitants of the part within the borough were not rated in respect of stock in trade:—Held, that the county justices had jurisdiction to try the appeal. (*Reg.* v. *Inhabitants of Bridgewater*, T. T. 1839, Q. B., 10 Ad. & E. 711).

had arisen, for any thing done in pursuance of the act, and for which no particular method of relief had been appointed.

The Court held, that the adjournment of such hearing was not to be considered a relief against the order, and that an objecting party was entitled to the remedy by appeal to the sessions. The complaint being, that annuities had been improperly granted, and payments made in respect of them:—Held, that the appeal, being within four months from the order made for such payments, was in time, the cause of complaint being the moving such order, not the borrowing or granting such annuities.

REX *v.* THACKWELL, E. T. 1825. K. B. 4 *B. & C.* 62.

THE overseers' accounts were allowed on the 27th of March, new overseers appointed on the 28th, and the next sessions were held on the 7th of April—

And the party is not bound to appeal at the next sessions in case of overseers' accounts.

The Court held, that the parties were not bound to appeal at those sessions, and that the justices had properly received the appeal at the Midsummer, and respited it to the Michaelmas sessions.

REX *v.* JUSTICES OF KENT, M. T. 1828. K. B. 8 *B. & C.* 639.—S. P. REX *v.* JUSTICES OF DEVON, M. T. 1828. K. B. *Id.* 640.—S. P. REX *v.* JUSTICES OF SOUTHAMPTON, M. T. 1828. K. B. *Id.* 641.

AN order of removal had not been served so as to give time for notice of trial of an appeal at the next sessions—

As to the removal of poor, where the appeal cannot be tried at the first sessions, it need not be entered and adjourned.

The Court held, that the appeal need not be entered until the sessions following the next; but it should be then entered and tried, notice of entering and trying being previously given.

(*c*) OF THE NOTICE, AND GROUNDS OF*. See 4 & 5 *Will.* 4, *c.* 76, *s.* 81, ante, p. 357, n.

1. *By and to whom Notice must be given, and Service of.*

REX *v.* JUSTICES OF YORKSHIRE, NORTH RIDING, T. T. 1837. K. B. 6 *Ad. & E.* 863.

A TOWNSHIP having a chapel and its own churchwardens was wholly independent of the parish, except contributing a small sum to the repair of the church.

The notice may be signed by the overseers of a township*,

The Court held this not to be by virtue of the office of overseers, and a notice signed by the overseers of the township only valid. Upon an objection that the notice was not signed by the assistant-overseer, the party must shew that it was his duty to sign.

* Semble, that the court of quarter sessions has no right to require that notice of intention to try an appeal against an order for the payment of church-rates, made by two justices under 53 Geo. 3, c. 127, shall be given to such justices. (*Rex* v. *Justices of Staffordshire*, E. T. 1836, K. B., 6 N. & M. 477; S. C. 4 Ad. & E. 842).

REX *v.* JUSTICES OF CARMARTHEN, H. T. 1833. K. B. 1 *N. & M.* 368.

or hamlet; REMOVAL to the parish of L., which, in fact, consisted of three different hamlets, each having churchwardens and overseers, and separate rates. The order with the paupers was delivered to the churchwardens and overseers of one of the hamlets. An appeal was entered at the next sessions in the name of the parish at large. Notice of the appeal was given, but in the notice it was described as an appeal against an order by which the paupers were removed to the hamlet. The sessions held the notice to be insufficient.

The Court held, that they were wrong; and a mandamus was directed, commanding them to hear it.

REX *v.* JUSTICES OF SURREY, T. T. 1837. K. B. 5 *Ad. & E.* 701, n.

and under a local act, notice signed by one trustee sufficient. A LOCAL road act, giving a power of appeal against assessments to any party thinking himself aggrieved, empowered also the trustees to sue and be sued in the name of any one or more.

The Court held, that a notice of appeal by one on behalf of his co-trustees was sufficient, although no authority was proved, they having made no disclaimer.

REX *v.* JUSTICES OF NORFOLK, M. T. 1831. K. B. 2 *B. & Ad.* 944.

Notice of appeal to the overseers sufficient*. AN appeal, intended to be against the accounts of overseers, was entered at sessions as an appeal against the churchwardens and overseers in respect of the accounts of the overseers. Notice of appeal was given to the overseers only, being the parties against whom it was really directed. The sessions refused to hear the appeal because notice had not been given to the churchwardens—

But the Court directed a mandamus, commanding them to hear the appeal.

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2. *Within what Time Notice to be given.*

REG. *v.* INHABITANTS OF DRAUGHTON, E. T. 1839. Q. B. 2 *P. & D.* 224.—S. P. REX *v.* JUSTICES OF SUFFOLK, M. T. 1835. K. B. 5 *N. & M.* 503.

The 4 & 5 Will. 4, c. 76, does not alter the time of notice of appeal †. ON the trial of an appeal against an order of removal, it had been objected, on the part of the respondent parish, that the notice of appeal was not given in time. The notice was given on the 19th of March, 1838, and the sessions were holden on the 2nd of April in

* But the notice of chargeability must be served. (*Rex* v. *Inhabitants of Brixham*, E. T. 1838, Q. B., 3 N. & P. 408).

Service of notice of appeal on the churchwardens is bad. (*Rex* v. *Inhabitants of Bishop Wearmouth*, H. T. 1834, K. B., 3 N. & M. 77).

† An order of removal was served on the 18th of March. The next sessions were held on the 8th of April. By the practice of the sessions, seven days' notice of appeal was required:—Held, that, since the 4 & 5 Will. 4, c. 76, s. 79, the Midsummer sessions following was the next practicable sessions for the purpose

the same year. The sessions held the notice to be in time, and quashed the order.

Per Cur.—It is not necessary, under the 4 & 5 Will. 4, c. 76, that notice of appeal against an order of removal should be given fourteen days before the sessions at which the appeal is intended to be tried. The practice, with respect to the time for giving such notice, remains as it was before the passing of the act.

REG. *v.* JUSTICES OF SALOP, E. T. 1838. Q. B. 3 *N. & P.* 286.

THE 4 & 5 Will. 4, c. 76, s. 81, which requires that, fourteen days at the least before the first day of the sessions, a statement of the grounds of appeal should be delivered to the respondents—

The Court held to mean fourteen clear days, and is not to be construed as one day inclusive and one exclusive.

And under that statute, there must be fourteen clear days*.

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3. *Form of Notice.*

REX *v.* JUSTICES OF KENT, E. T. 1817. K. B. 6 *M. & S.* 258.

A LOCAL act, imposing penalties, provided, that a party aggrieved might appeal against any conviction made within six days before any general or quarter sessions, on entering into recognizances at the time of such conviction, or within twenty-four hours after, with sureties, &c., to prosecute such appeal, either at the then next or the next following general quarter sessions, without requiring any notice.

The Court held an order of the sessions, requiring notice of appeals to be given eight days before the sessions began, did not apply to a case where no notice was required by the act.

Before 4 & 5 Will. 4, notice of appeal might be varied by a local act so as to supersede any general practice on the subject†.

of appealing. (*Reg.* v. *Justices of Herefordshire*, T. T. 1840, B. C., 8 D. P. C. 638).

Where a parish gives notice of appeal, under the 4 & 5 Will. 4, c. 76, s. 79, against an order of removal, within twenty-one days after service of the order of removal, but does not prosecute the appeal at the next practicable sessions, and the respondent parish does not remove the pauper for a considerable time afterwards, the appellants may give fresh notice of appeal, pursuant to 13 & 14 Car. 2, c. 12, s. 2, when the pauper is actually removed. (*Rex* v. *Justices of Middlesex*, M. T. 1840, B. C., 9 D. P. C. 163).

If a regular notice of appeal has been given for one sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. (*Rex* v. *Justices of Gloucestershire*, H. T. 1835, B. C., 3 D. P. C. 298).

* The fourteen days apply to the time the parish was aggrieved. (*Rex* v. *Carpenter*, T. T. 1837, K. B., 6 Ad. & E. 894).

† But now, if the notice be not in conformity with the 4 & 5 Will. 4, the Court will not interfere. (*Reg.* v. *Inhabitants of Abergele*, M. T. 1838, Q. B., 3 N. & P. 406).

In a notice of appeal under the stat. 4 & 5 Will. 4, c. 76, s. 81, against an order of removal, alleging as the ground of appeal a settlement by hiring and service, the general rule is, that the date of the service, as well as the master's name, should be stated, and that a notice omitting such date is bad. If it appear that the appellants could not ascertain it, semble, per Lord *Denman*, C. J., and *Littledale*, J., that the strict rule may be dispensed with. (*Reg.* v. *Inhabitants of Bridgewater*, H. T. 1841, Q. B., 10 Ad. & E. 693).

4. *Of the Grounds of Appeal.* See ante, 4 & 5 *Will.* 4, *c.* 76, p. 357.

REX *v.* INHABITANTS OF KIMBOLTON, E. T. 1837. K. B. 1 *N. & P.* 606.

Under 4 & 5 Will. 4 the grounds of appeal and notice are separate instruments.

AN appeal against an order of removal being entered, it was objected that the statement of the grounds of appeal had not been duly served according to 4 & 5 Will. 4, c. 75, s. 81; the sessions decided that the objection was valid, and adjourned the appeal.

The Court held, that they had power to do so. A statement of the grounds of appeal must be served upon the overseers: if delivered to their attorney, the service is insufficient.

REG. *v.* INHABITANTS OF HOCKWORTHY, H. T. 1838. Q. B. 2 *N. & P.* 383.

Grounds not stated cannot be insisted on*;

ON motion to quash an order of sessions—

The Court held, that the appellants cannot insist upon any point for quashing the order not stated in the grounds of appeal, and, therefore, that the respondents were not obliged to give evidence of the settlement on which the removal was made, where the notice was of a settlement in a third parish.

REX *v.* JUSTICES OF CORNWALL, M. T. 1836. K. B. 1 *N. & P.* 20; S. C. 5 *Ad. & E.* 134.

but under 4 & 5 Will. 4 it is sufficient to

THE notice only stated the grounds to be that the paupers were settled in another parish, without going on to state the nature of that settlement—

* Where the ground stated in the notice of appeal was, that no settlement was gained under a parish binding, by reason of non-compliance with 56 Geo. 3, c. 139, s. 51:—Held, that a non-compliance with the provisions of sect. 2 could not be objected as actually misleading the respondents as to the point relied on. (*Reg.* v. *Inhabs. of Whitley Upper*, E. T. 1840, Q. B., 11 Ad. & E. 90; S. C. 3 P. & D. 90). The statement of the grounds of appeal, signed by the majority of the parish officers, is sufficient; and semble, service on one only, if without fraud. (*Rex* v. *Justices of Warwickshire*, M. T. 1837, K. B., 2 N. & P. 153; S. C. 6 Ad. & E. 873). Where a court of quarter sessions refuses to hear the appeal against an order of removal, on the ground that the appellant parish has not two legal overseers, because one of them claims an exemption from serving the office, but which exemption has not been allowed, this Court will compel the sessions to hear the appeal. (*Reg.* v. *Justices of Cheshire*, T. T. 1840, B. C., 8 D. P. C. 616). But the grounds of appeal must not be stated generally, though particulars must be given so as to afford to the opposite party a reasonable means of inquiry. (*Rex* v. *Justices of Derbyshire*, E. T. 1837, K. B., 1 N. & P. 703).

Where, from the copy of the examination, it appeared that the pauper stated that his father belonged to the parish of C., and that he was a certificated man from C.:—Held, that under this notice a settlement of the father by apprenticeship in C. might be shewn. (*Rex* v. *Inhabitants of Helveden*, M. T. 1836, K. B., 1 N. & P. 138). An order of removal of a man, his wife, and children, which omitted to state the names and ages of his children, was appealed from, but the statement of the ground of appeal did not contain any objection to the order on account of that omission:—Held, that the sessions could not entertain it, and that this Court would not quash the order as a nullity when brought up by certiorari on a case granted by the sessions. (*Rex* v. *Inhabitants of Witherswick*, H. T. 1837, K. B., 1 N. & P. 423). The mere fact of being left out of the rate, where no undue motive appears, does not of itself import a grievance to ground an appeal. (*Rex* v. *George*, H. T. 1837, K. B., 1 N. & P. 451). Where an appeal against an order of removal has been heard, and, in consequence of the justices being equally divided, is adjourned to a subsequent sessions for another hearing, the appellants cannot serve another statement containing new grounds of appeal. (*Reg.* v. *Inhabitants of Arlecdon*, M. T. 1839, Q. B., 11 Ad. & E. 87; S. C. 3 P. & D. 93).

The Court held this a sufficient compliance with 4 & 5 Will. 4, c. 76, s. 81, and granted a mandamus to the sessions to enter continuances and hear the appeal.

state the paupers are settled in another parish.

Rex *v.* Brooke, T. T. 1829. K. B. 9 *B. & C.* 915.—S. P. Rex *v.* George, H. T. 1837. K. B. 1 *N. & P.* 451.

By the construction given to the 41 Geo. 3, c. 23, s. 6, the person who appeals against a poor-rate on the ground that a person is omitted who ought to be rated, is bound to give notice of the appeal to the person so omitted; and on failure of proof of such notice—

The Court held, that the sessions were not bound to hear the appeal, but might confirm the rate.

A party not rated, who ought to have been, is not in general a ground of appeal.

Reg. *v.* Justices of Sussex, H. T. 1840. Q. B. 3 *P. & D.* 42.

The grounds of appeal against an order of removal were, that the pauper acquired a settlement in the parish of T., first, by having in or about the year 1830 paid parochial taxes for a certain tenement in the aforesaid parish, &c.; secondly, by having rented the aforesaid tenement in the said parish of T. at 15*l.* a year, and having occupied the same under such hiring for more than the term of one year, and having paid rent to the amount of 10*l.* for the same tenement.

The Court held, that the grounds of appeal were not sufficiently explicit in describing the tenement, inasmuch as they did not state the local situation, or the name of the landlord, and therefore that the sessions were right in refusing to allow the appellant parish to procure a settlement by renting a tenement in T.

Where the question arose respecting the rating a tenement, the name of the landlord must be stated.

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5. *Evidence by, and Effect of Order.*

Reg. *v.* Justices of Sussex, M. T. 1840. B. C. 9 *D. P. C.* 125.

On an appeal against an order of removal, the sessions had, according to the old rule in Burn, requiring the appellants to produce the original order, or, if only a copy served, to give notice to produce the original, which had not been done, refused to receive the copy in evidence.

The Court held this correct, and that the 4 & 5 Will. 4, c. 76, had not altered the law so as to render the ancient practice no longer applicable or legal.

The 4 & 5 Will. 4 has not altered the law as to producing the order, &c.

Rex *v.* Padstow, M. T. 1832. K. B. 1 *N. & M.* 9; S. C. 4 *B. & Ad.* 208.

The existence of an agreement for the tenancy in writing was not elicited either in the examination or cross-examination of the respondents' witnesses—

The Court held, that the appellants' witnesses proving such to have existed, they were bound to produce it.

If an agreement be in writing it must be produced.

REX *v.* JUSTICES OF MISTERTON, H. T. 1838. Q. B. 2 *N. & P.* 109; S. C. 6 *Ad. & E.* 878.

After appeal the respondents cannot shew a new state of facts.

THE pauper had been removed, with a copy of his examination, in which he had stated a hiring with A. B., and service with the wife, on which statement a notice of appeal was given, and the ground alleged that no settlement appeared on the examination.

The Court held, that the respondents could not introduce a new state of facts, which, if communicated, might have induced the appellants to have withdrawn their appeal, or have prepared themselves with fresh evidence.

REG. *v.* INHABITANTS OF CHURCH KNOULE, H. T. 1838. Q. B. 2 *N. & P.* 359.

An order of sessions on the merits is conclusive*.

ON an appeal, the respondents finding a supposed defect in the examination of the pauper, without communicating their motives to the Court, or to the appellants, quashed their own order, with consent of the latter.

The Court held, that, on a subsequent removal to the same parish, this quashed order was conclusive as to the settlement up to that date.

REG. *v.* INHABITANTS OF WYE, E. T. 1838. Q. B. 3 *N. & P.* 6.

Facts subsequent to the order of removal may be shewn to defeat it†.

BY an order of removal, D. S., his wife and six children, were removed to the parish of W., which order was confirmed on appeal. Subsequent to that confirmation the marriage of D. S. was dissolved by the Ecclesiastical Court for incest. A. B., a son of D. S., and his wife, but not named in that order, was subsequently removed to the parish of W.

The Court held, that, on an appeal against the second order, evidence of this decree was admissible to negative the derivative settlement of A. B. from D. S., as he was not named in the former order of removal.

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6. *Of Re-hearing* ‡.

XII. RELATIVE TO COSTS §. See 4 & 5 *Will.* 4, *c.* 76, *s.* 82.

* And where the order of removal was founded upon a statement in the examination of renting a tenement during a particular period, which proved to be erroneously stated, and the order was quashed:—Held, that such order of sessions was conclusive, and a subsequent order made upon a fresh examination, stating the period correctly, quashed. (*Reg.* v. *Inhabitants of Clint*, T. T. 1841, Q. B., 11 Ad. & E. 624, n.).

† The copy of the examination must agree with the proof. (*Broseley, Ex parte*, H. T. 1838, Q. B., 2 N. & P. 355).

‡ The Court cannot direct the sessions to re-hear an appeal on the ground of the rejection of evidence. (*Pratt, Ex parte*, H. T. 1838, Q. B., 2 N. & P. 102).

§ Under the 15 Geo. 3, c. 11, s. 4, (Thames and Isis Navigation Act), the sessions have no power to give costs against an appellant. (*Reg.* v. *Justices of Oxfordshire*, M. T. 1840, B. C., 9 D. P. C. 189). But where, on an appeal

XIII. RELATIVE TO CERTIORARI. See, also, tit. *Certiorari.*

REX *v.* JUSTICES OF DENBIGH, M. T. 1830. K. B. 1 *B. & Ad.* 616.

No certiorari lies where the order granted on the merits*.

A PARISH was divided into three separate districts, each maintaining their own poor, there being two churchwardens for the whole parish, and one overseer for each district; an order of removal directed generally to the churchwardens and overseers of the parish was delivered to the overseer of one district, who singly, with the churchwardens, gave notice of appeal, which the sessions dismissed, on the ground of its being prosecuted by a single overseer; after which an appeal was entered on the part of some inhabitants, and two overseers being subsequently appointed, they joined with the churchwardens in the notice of prosecuting it at the next sessions, when it was heard, and the order quashed on the merits, with costs. On motion for a certiorari, in order to quash the proceedings for irregularity—

The Court refused to disturb them.

XIV. RELATIVE TO MANDAMUS CONNECTED WITH.

REX *v.* JUSTICES OF SUFFOLK, M. T. 1836. K. B. 1 *N. & P.* 306.

Under 4 & 5 Will. 4 a mandamus refused to hear an appeal†.

THE sessions having quashed an order of removal upon the 4 & 5 Will. 4, c. 72, ss. 79, 81, on the ground that the respondents had not sent a copy of the examination as to the chargeability of the

against a borough rate, the original rate was produced, and inspected by the recorder, upon an objection as to the time when made, and the appeal was then adjourned at the request of the respondents at two successive sessions, when the rate was abandoned:—Held, that the rate was sufficiently before the Court to give it jurisdiction to confirm the appeal with costs. (*Reg.* v. *Stamford Corporation*, M. T. 1838, Q. B., 1 P. & D. 72). The sessions have power to grant costs under 8 & 9 Will. 3, c. 30, s. 3, in all cases in which an appeal has been entered and determined, whether the determination be upon the merits or for the defect of form. (*Rex* v. *Inhabitants of Cottingham*, M. T. 1834, K. B., 4 N. & M. 215). It is a good practice for the clerk of the peace to ascertain the amount of the costs in such cases. (*Holloway, Ex parte*, H. T. 1831, B. C., 1 D. P. C. 26).

* A certiorari, removing an order of sessions, does not remove a new subsequent order; and the order must be removed within six months. (*Rex* v. *Bloxam*, E. T. 1834, K. B., 3 N. & M. 385; S. C. 1 Ad. & E. 386).

† Where, on an appeal against a county rate, the sessions confirmed the rate, subject to the opinion of the Court of K. B. on a case, and the Court declared the rate bad, and quashed the order of sessions, but the rate not having been removed, upon application to quash the rate, the sessions refused, on the ground that the appeal was no longer before the Court; a mandamus to compel them was refused, the Court having no right to direct the sessions as to what judgment they ought to give, and as it would expose to actions the parties who had acted on the rate; and the objection being made, by the local act, a specific ground of appeal, the Court refused a removal by certiorari of a second rate, against which no appeal had been made, and which was good on the face of it, or to quash it. (*Reg.* v. *Justices of Middlesex*, H. T. 1839, Q. B., 1 P. & D. 402).

Where, upon an appeal in petty sessions against a poor-rate, under 6 & 7 Will. 4, c. 96, s. 6, a notice of appeal from their decision was given, and within

paupers, subject to a case upon the necessity thereof, which case the respondents had not brought up—

The Court refused a mandamus to compel the sessions to enter continuances, and hear the appeal.

REX *v.* JUSTICES OF LANCASHIRE, H. T. 1828. K. B. 7 *B. & C.* 691.

Before that statute, a mandamus would be granted to compel the sessions to hear an appeal;

THE rule of the sessions required the notice of appeal against an order of removal to be given fourteen days, exclusive of the day of notice and the day of holding the sessions at which it was to be tried, and the notice had been given a day too late, upon a mistake as to one of the days being exclusive and the other inclusive. The sessions having refused to hear the appeal—

The Court, admitting the discretion of the sessions to make rules for governing their practice at the sessions, yet, for the purposes of justice, it would interfere to controul that discretion, granted a mandamus to enter continuances, and hear the appeal.

REX *v.* JUSTICES OF GLOUCESTER, T. T. 1830. K. B. 1 *B. & Ad.* 1.

against a poor-rate.

AFTER hearing one witness, upon its being objected that he was not competent to sustain the appeal, the sessions dismissed it, without hearing the appellant:—Held, that the objection going to prevent their exercising any jurisdiction at all, it was to be considered as not heard; and a mandamus was therefore granted, calling upon them to hear the appeal.

REX *v.* JUSTICES OF SUFFOLK, E. T. 1817. K. B. 6 *M. & Selw.* 57.

But a mandamus does not lie to the sessions on a mere error of the practice.

UPON an appeal, on the ground of the party being over-rated, the sessions having required the appellant to begin, and make out his allegation, which he refusing to do, the sessions dismissed the appeal—

The Court refused a mandamus upon a mere alleged error in practice of the sessions.

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five days after recognizances were taken, and entered in the minute book by the clerk of the petty sessions, but the recognizances, when produced, appeared not to have been signed by any justices:—Held, not to invalidate the recognizances, and a mandamus granted to the sessions to enter continuances, and hear the appeal. (*Rex* v. *Justices of St. Albans*, M. T. 1838, Q. B., 1 P. & D. 148).

The Court will not issue a mandamus to a court of quarter sessions, commanding them to grant a case, although, under special circumstances, it may issue such a mandamus, commanding the sessions to state a case. (*Reg.* v. *Inhabitants of Jarvin*, M. T. 1840, B. C., 9 D. P. C. 121). So, the Court will not grant a mandamus commanding the justices in sessions to try an appeal dismissed for want of notice of trial, where the court of quarter sessions has granted a case upon the question whether it had been rightly dismissed, which has been abandoned by the party applying for the mandamus. (*Rex* v. *Justices of West Riding of Yorkshire*, T. T. 1834, K. B., 3 N. & M. 757; S. C. 1 Ad. & E. 606).

Set-off.

I. RELATIVE TO WHEN IT WILL OR WILL NOT BE ALLOWED.

(*a*) Nature of the debt, p. 367.

(*b*) As regards particular persons, p. 369.

II. RELATIVE TO HOW AVOIDED, AND POWER OF THE COURT TO COMPEL, p. 369.

III. RELATIVE TO THE MODE OF SETTING OFF.

(*a*) Of the plea, p. 369.

(*b*) Of the particulars, p. 370.

(*c*) Of the replication, p. 370.

(*d*) Of the evidence, p. 370.

(*e*) Of the course of proceeding at the trial, p. 371.

IV. RELATIVE TO THE ACTION AFTER AN ATTEMPT TO SET OFF, p. 371.

I. RELATIVE TO WHEN IT WILL OR WILL NOT BE ALLOWED.

(*a*) Nature of the debt.

France *v.* White, M. T. 1839. C. P. 6 *Bing. N. S.* 33; S. C. 8 *D. P. C.* 53.

A. and B. sued as partners two defendants for work done for them in the matter of an executorship—

The debt must be due in same right, and a separate debt cannot be set off against a joint demand*.

The Court held, that they could not set off money received by A. before he became a partner; and that a statement by A., on the settlement of the executorship accounts, made after the partnership,

* The debt sought to be set off must be due and payable at the time of action brought. (*Young* v. *Gye*, E. T. 1825, C. P., 10 Moore, 198; S. P. *Braithwaite* v. *Coleman*, E. T. 1835, K. B., 4 N. & M. 654). A mere liability to pay, without actual payment, cannot be the subject of a set-off. (*Leman* v. *Gordon*, E. T. 1838, N. P., 8 C. & P. 392). In an action on a schoolmistress's bill, with a plea of set-off for money had and received, it was opened on the part of the defendant, that a friend of his (since dead) had paid former school accounts due from the defendant to the plaintiff, and in settling those accounts had paid overcharges, of which the defendant now meant to avail himself on his plea:—Held, that, in the absence of fraud, the settled accounts could not be opened. (*Lawes* v.

and admitting the prior receipt, was not to be deemed as an admission of money of the defendants being in their joint hands.

DUCKWORTH *v.* ALISON, E. T. 1836. Ex. 1 *M. & W.* 412.

A weekly sum to be forfeited for non-completion of works within stipulated time may be set off.

IN a builder's contract it was stipulated that, in the event of the work not being completed within a given period, the builder should forfeit and pay to the employer 5*l.* weekly, such penalty to be deducted from the amount which might remain owing on the completion of the work.

The Court held, that the employer had a double remedy for the penalty, and might either deduct as a set-off, or recover it as a payment.

OWENS *v.* DENTON, H. T. 1835. Ex. 1 *C., M. & R.* 711; S. C. 5 *Tyrw.* 359.

So, a settled account, founded on an illegal measure, may be set off.

THERE had been a contract for the sale of goods by an illegal measure, and the purchaser received them, and allowed for the price of them in an account which was settled between the parties.

The Court held, that he could not afterwards impeach the sale, such settlement of account being equivalent to payment, and capable of being set off.

BELCHER *v.* LOYD, M. T. 1833. C. P. 10 *Bing.* 310; S. C. 3 *M. & Scott*, 822.

But after a transaction is closed, another party cannot make it available as a set-off.

THE defendants, as indorsers of a bill from B. and C., entered it in their short-bill credit-book to B. and C., and afterwards returned the bill to them, having in their hands at the time sufficient assets, and, on the same day, the drawer M. stopped payment; of the probability of which the defendants had previously apprised B. and C., who had in reply suggested that the defendants might avail themselves of the bill as a set-off against an acceptance from him; and B. and C. accordingly returned the bill to the defendants. In an action by M.'s assignees on the acceptance—

The Court held, that the defendants having, after such entry in the credit-book to B. and C. and sending them the bill, closed that transaction with B. and C., the bill could not be set off.

Eastmure, M. T. 1837, N. P., 8 C. & P. 205). And a plaintiff having given a guarantie for the payment of 1,600*l.*, and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantie is not the subject of a set-off to a declaration for money had and received, and on an account stated. (*Morley* v. *Inglis*, M. T. 1837, C. P., 6 D. P. C. 202; S. C. 4 Bing. N. S. 58; S. C. 3 Scott, 314).

By Reg. Gen., H. T. 2 Will. 4, "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted." In setting off one judgment against another, subject to the attorney's lien for costs:—Held, that, upon the construction of the Rule of Hilary Term, 2 Will. 4, such costs are to be taxed as between attorney and client. (*Watson* v. *Maskell*, 1 Bing. N. S. 727). The Court refused an application to its equitable jurisdiction to impound the sum levied under a judgment against the defendant, until an action by the defendant on a cross-demand had been determined. (*Williams* v. *Cooke*, E. T. 1825, C. P., 10 Moore, 321).

(*b*) As regards particular persons.

Tucker *v.* Tucker, E. T. 1833. K. B. 1 *N. & M.* 477.

In an action of debt on bond by the plaintiff, as executor of G. T., who was trustee of the bond for T. S., against the defendant, as executrix of C. T.— A debt claimed by a cestui que trust cannot be set off*.

The Court held, that a debt due from S. T., the cestui que trust, to C. T., as executrix of W. T., was not the subject-matter of set-off within the stat. 2 Geo. 2, c. 22, s. 13.

Sed vide 1 *T. R.* 621.

II. RELATIVE TO HOW AVOIDED, AND POWER OF THE COURT TO COMPEL.

Thorpe *v.* Thorpe, E. T. 1832. K. B. 3 *B. & Ad.* 580.

Plaintiff gave defendant a bill of exchange for 84*l.* 4*s.* and a sum of 13*l.* 16*s.*, to be paid over by him to one T. W., in discharge of a debt due from the plaintiff to the latter, and they were received by the defendant for that purpose, but were not paid over to T. W. In an action for money had and received— A set-off may be avoided by declaring specially†.

The Court held, that the defendant was entitled to set off a sum of money due from the plaintiff to him. The plaintiff should have brought trover for the bill, or a special action for not paying over to T. W.; as, by bringing money had and received, he confirmed the contract, and let in all the consequences.

III. RELATIVE TO THE MODE OF SETTING OFF.

(*a*) Of the plea†.

Carr *v.* Hinchliff, T. T. 1825. K. B. 4 *B. & C.* 547; S. C. 7 *D. & R.* 42.

To a declaration for goods sold and delivered, the defendant pleaded, that the goods were sold to him, with the knowledge of the It is a good plea, that the

* So, a debt from the testator cannot be set off in an action for money had and received to the use of the plaintiff as executor. (*Schofield* v. *Corbett*, E. T. 1836, K. B., 6 N. & M. 527).

The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against a stake of another race, won by the plaintiff's horse. (*Charlton* v. *Hill*, 1831, N. P., 5 C. & P. 147).

An agreement by a broker, that he will sell goods for his principals, and pay over the proceeds, without setting off a debt due from the principals to him, is not binding. But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having taken the funds of that firm, the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods. (*M'Gillivray* v. *Simson*, T. T. 1826, N. P., 2 C. & P. 326). But a broker who effects a policy on goods on which he has a lien may set off a loss against premiums due from him. (*Davies* v. *Wilkinson*, H. T. 1827, C. P., 4 Bing. 573; see 4 Taunt. 541; 2 M. & S. 112). So, a colonel of a regiment, who has given a power of attorney to an agent to receive money from the paymaster, may set off such monies in an action by the agent's assignees for goods sold. (*Knowles* v. *Maitland*, E. T. 1825, K. B., 4 B. & C. 173).

† Semble, where there are cross-demands, the Court cannot interfere to compel set-off. (*Jackson* v. *Godard*, M. T. 1832, Ex., 1 C. & M. 46).

‡ By Rule H. T. 4 Will. 4, set-off and mutual credit must be pleaded.

goods were sold by J. S., plaintiff's agent, and that he was indebted to defendant*.

plaintiff, by another person, who was the agent of the plaintiff; and that the plaintiff was not known to the defendant as the proprietor thereof, but that the defendant bought them as the goods of that other person, who was indebted to him, and thereupon he was entitled to set off, according to the form of the statute.

The Court held the plea to be good on general demurrer; but they said it would have been bad on special demurrer for concluding with a set-off, according to the form of the statute.

(*b*) OF THE PARTICULARS†.

(*c*) OF THE REPLICATION‡.

(*d*) OF THE EVIDENCE §.

* Where the general issue and another plea were pleaded, the defendant was not entitled to give a set-off in evidence upon a notice (now abolished), but he was bound to plead the set-off. (*Duncan* v. *Grant*, T. T. 1834, Ex., 1 C., M. & R. 383; S. C. 2 D. P. C. 683; S. C. 4 Tyrw. 818). Before the new Rules, a party was not obliged to plead a set-off to an action brought by assignees of a bankrupt. (*Wells* v. *Croft*, M. T. 1830, N. P., 4 C. & P. 332). And it seems the Judges were not prevented by the proviso in the 3 & 4 Will. 4, c. 42, s. 1, from making the Rule, Hilary Term, 4 Will. 4, which requires a set-off to be pleaded in all cases; and, therefore, a notice of set-off, given with a plea of nunquam indebitatus, is inoperative. (*Graham* v. *Partridge*, E. T. 1836, Ex., 1 M. & W. 395). A plea of set-off, which stated "that, before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," without adding, "and still is indebted," was held bad on demurrer. (*Denby* v. *Powell*, E. T. 1838, Ex., 3 M. & W. 442).

† By Rule, Reg. Gen. T. T., 1 Will. 4, it is ordered, "that a copy of the particulars (if any) of the defendant's set-off shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's marshal." A defendant who has not complied with a Judge's order to deliver particulars of set-off, with dates, will not be allowed to give any evidence of his set-off. (*Swain* v. *Roberts*, H. T. 1835, N. P., 1 M. & Rob. 452). A summons having been taken out at chambers for further and better particulars of the defendant's plea of set-off, the decision of the Judge was postponed after the first hearing, in order that the defendant might produce an affidavit. The defendant, having failed to produce the affidavit, applied to the Court for a rule to discharge the summons, and calling on the plaintiff to shew cause why the particulars delivered should not be deemed sufficient:—Held, that such an application could not succeed while the summons was pending. (*Abbott* v. *Hopper*, M. T. 1839, C. P., 8 D. P. C. 19). The Court set aside a particular of set-off, which the defendant was attempting to avail himself of in contravention of an express understanding between the parties as to the real question to be tried. (*Gould* v. *Oliver*, T. T. 1838, C. P., 6 Scott, 648).

‡ Where a plaintiff replies to a plea of set-off, "that he was not, nor is, indebted to the defendant in manner and form &c.," he is at liberty to give evidence of payment in answer to the proof in support of the set-off. (*Jackson* v. *Robinson*, T. T. 1840, B. C., 8 D. P. C. 622). But if the plaintiff replies nunquam indebitatus to a plea of set-off, and the defendant proves his plea, the plaintiff will not be at liberty under his replication to shew that the sum proved, or even any part, has been paid. The new rules of pleading do not apply to replications. (*Brown* v. *Daubeny*, H. T. 1836, B. C., 4 D. P. C. 585).

To a plea of set-off, the Statute of Limitations may be replied. (*Chapple* v. *Durston*, E. T. 1830, Ex., 1 C. & J. 1).

§ To a declaration in debt, the defendant pleaded, first, as to part, a set-off; secondly, as to further part, goods returned; thirdly, as to the residue, payment into Court. Upon these pleas he proved sufficient to cover the plaintiff's demand stated in his particulars, but less by 2*l.* than he alleged in his plea of set-off:—Held, that the plaintiff was entitled to a verdict for the 2*l.* (*Green* v. *Marsh*, T. T. 1837, B. C., 5 D. P. C. 669). To sustain a plea of set-off the money need not be demanded. (*Sanderson* v. *Bell*, M. T. 1833, Ex., 2 C. & M. 304).

(*e*) Of the course of proceeding at the trial*.

IV. RELATIVE TO THE ACTION AFTER AN ATTEMPT TO SET OFF.

Eastmore *v.* Lords, E. T. 1839. C. P. 5 *Bing. N. S.* 444; S. C. 7 *D. P. C.* 431.

A defendant pleaded a set-off, which plea, as he was not able to support it by evidence, was found against him, and afterwards he brought an action to recover the amount of such alleged set-off—

The Court held, that the verdict of the jury in the former action and judgment entered thereon might be pleaded as a bar to the action, and by way of estoppel to the claim.

Defendant cannot bring an action for the subject-matter of a set-off upon which he has failed in a cross action.

Settlement and Removal of the Poor†.

I. RELATIVE TO THE SETTLEMENT OF.

(*a*) By birth and parentage.

1. *Of legitimate Children*, p. 374.

2. *Of illegitimate Children*, p. 376.

(*b*) By marriage, p. 376.

* Where there are cross-demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance which he claims, and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to shew that a larger sum was due. (*Williams* v. *Davies*, H. T. 1833, Ex., 1 C. & M. 464; S. C. 1 D. P. C. 647). In assumpsit for the carriage of goods, and on an account stated, the defendant pleaded non assumpsit, part payment, and a set-off as to part. The cause was undefended, and the plaintiff proved a greater amount for carriage than he went for, but wished to allow the part payment and set-off, and take a verdict for the balance. The Judge directed a verdict for the plaintiff for the balance, with an indorsement on the postea, that the two other sums were allowed to the defendant. (*Butt* v. *Burke*, 1837, N. P., 7 C. & P. 806).

† As the 4 & 5 Will. 4, c. 76, has introduced a variety of alterations in the law of settlement and removal of the poor, it has been deemed expedient to insert the leading cases before that statute in the notes. An analysis of the part of the statute, not given under tit. *Poor*, may be useful:—

Sect. 64. Repeal of settlement by hiring and service.

Sect. 65. No settlement incomplete, under hiring and service to be completed.

Sect. 66. No settlement acquired by, without paying poor-rate.

Sect. 67. Nor by being apprenticed in the sea-service;

Sect. 68. Nor by possession longer than the person shall inhabit within ten miles thereof.

Sect. 69. Repeal of acts relating to liability and punishment of putative father, and punishment of mother of illegitimate children.

Sect. 70. Securities and recognizances for indemnity of parishes against children likely to be born bastards to be null and void. Persons in custody for not giving indemnity to be discharged.

Sect. 71. Mother of illegitimate children bound to maintain the same.

Sect. 72. Court of quarter sessions, on application to overseers, may make an order on putative father of child for its support; monies paid not applicable to support of mother.

Sect. 73. No application to be heard without fourteen days' previous notice.

(*c*) By hiring and service.

1. *Who is a Servant,* p. 377.
2. *Of the Contract of Hiring,* p. 377.
3. *Of the Year's Service,* p. 379.
4. *Of several Hirings, and the same being continuous,* p. 379.
5. *Of the Residence,* p. 380.
6. *Of the Evidence,* p. 380.
7. *Of the Sessions,* p. 380.
8. *Of the* 3 *&* 4 *Will.* 4, *c.* 76, p. 381.

If application be heard, costs may be calculated from birth of bastard child, if within six months.

Sect. 74. In the event of party charged not appearing, Court may nevertheless enter into the case.

Sect. 75. Party summoned, if suspected of intending to abscond, may be required to enter into a recognizance for his appearance.

Sect. 76. When payments get into arrear, putative father may be proceeded against by distress or attachment of wages.

Sect. 77. No person employed in administration of poor laws to furnish, for his own profit, goods or provisions given in parochial relief.

Sect. 78. Sums payable under 43 Eliz. c. 2, s. 7, by relations of persons, how recoverable.

Sect. 79. No person to be removed till after notice of his being chargeable has been sent to the parish to which order of removal is directed. Such person may be removed, if order submitted to; but not in case of appeal.

Sect. 80. In case of appeal, the overseer to have access to such person touching his settlement.

Sect. 81. Grounds of appeal to be stated in notice.

Sect. 82. Parish losing appeal to pay such costs as Court may direct.

Sect. 83. Party making frivolous or vexatious statements to pay costs.

Sect. 84. Costs of relief to be paid by parish to which poor persons belong. Relief under suspended order not to be recoverable unless notice sent of such order.

Sect. 85. Power to call for and publish accounts of trust and charity estates.

Sect. 86. Advertisements, &c. not liable to stamp duty.

Sect. 87. Bonds and securities made pursuant to 22 Geo. 3, c. 23, and assignments thereof, exempted from stamp duty.

Sect. 88. Letters to and from board of commissioners to be free of postage, if sent conformable hereto. Letters sent under cover not relating solely to the provisions of the act to be transmitted to Post-office to be charged.

Sect. 89. Payments contrary to this act to be disallowed.

Sect. 90. Service of summons.

Sect. 91. Repeal of so much of 6 Geo. 4, c. 80, as relates to prohibition of spirituous liquors in workhouses.

Sect. 92. Penalty on persons introducing spirituous liquors into workhouses.

Sect. 93. Penalty on masters of workhouses allowing use of spirituous liquors, or ill-treating poor persons, or misconducting himself.

Sect. 94. Masters to hang up copies of two preceding clauses in workhouses.

Sect. 95. Penalty on overseers and other officers disobeying guardians.

Sect. 96. No overseer to be prosecuted for not exceeding illegal orders of justices.

Sect. 97. Penalty on overseers, &c. purloining, &c. goods, &c. 20*l.*, and treble the value of goods purloined.

Sect. 98. Penalty on persons wilfully disobeying rules, orders, and regulations.

Sect. 99. Forfeitures, costs, and charges may be levied by distress and sale. In what manner to be applied.

Sect. 100. Owners, rate-payers, &c. may be competent witnesses.

Sect. 101. Justices may proceed by summons for the recovery of penalties.

Sect. 102. Satisfaction recoverable for special damage, but distress not unlawful for want of form in the proceedings. Plaintiff not to recover for irregularity, if tender of amends be made.

(*d*) By apprenticeship.

1. *Of the Binding necessary.*

1.—*Of the Contract, in general,* p. 382.

2.—*Of the Stamp,* p. 383.

3.—*Of the Date,* p.383.

4.—*Of the Consideration,* p. 383.

5.—*Of the Term,* p. 383.

6.—*As to the Consent of Justices,* p. 384.

7.—*As to Parish Officers, Charities, and Corporations,* p. 385.

8.—*Where Contract made in Foreign Country,* p. 385.

9.—*Effect of Fraud,* p. 385.

2. *Of the Service,* p. 386.

3. *Of the Assignment,* p. 387.

4. *Of the Dissolution,* p. 388.

5. *Of the Evidence,* p. 388.

(*e*) By renting a tenement.

1. *In General, and Construction of Statutes,* p. 388.

2. *As to the kind of Tenement.*

1.—*In General,* p. 389.

2.—*As to the Contract, and relation of Landlord and Tenant,* p. 390.

3.—*As to several Tenements,* p. 391.

4.—*As to Underletting,* p. 391.

5.—*Effect of Assignment to Creditors,* p. 391.

6.—*As to Joint Tenants,* p. 392.

3. *As to the Value and Payment of Rent,* p. 392.

4. *As to the Occupation,* p. 392.

5. *As to the Residence,* p. 393.

6. *As to the Evidence,* p. 394.

Sect. 103. Appeal to the quarter sessions against order of justices within four calendar months after cause of complaint, &c. Fourteen days' notice in writing to be given, &c. and recognizances to be entered into.

Sect. 104. Limitation of actions; defendant may plead the general issue; costs.

Sect. 105. Rules, &c. to be removable by certiorari to Court of King's Bench. Rules, &c. so removed to continue in force until declared illegal.

Sect. 106. Notice to be given to commissioners of application for writ of certiorari, &c.; commissioners may shew cause.

Sect. 107. Recognizances to be entered into. If rule be declared illegal, commissioners to be entitled to costs.

Sect. 108. If rules are granted, the same to be notified to parishes to which such rules have been directed. Proviso for existing contracts. No person to be answerable until receipt of notice.

Sect. 109. Interpretation clause, 22 Geo. 3, c. 83.

Sect. 110. Act may be amended this session.

(*f*) By paying rates or taxes, p. 394.

(*g*) By possessing an estate.

1. *As to the kind of Estate*, p. 396.
2. *Of the Construction of Statutes*, p. 398.
3. *Of the Value*, p. 398.
4. *Of the Occupation and Residence*, p. 398.
5. *As to Husband and Wife, and Infants*, p. 399.
6. *Evidence of*, p. 399.

(*h*) By serving an office, p. 399.

(*i*) By certificate, p. 400.

(*j*) As to lunatics, p. 402.

II. RELATIVE TO THE REMOVAL OF.

(*a*) In General, p. 402.

(*b*) Of the order of.

1. *Of the Justices*, p. 403.
2. *To whom addressed*, p. 403.
3. *Service of*, p. 404.
4. *Amendment of, and Effect of Fraud*, p. 404.
5. *Effect of, and who entitled to Custody of*, p. 404.
6. *Quashing*, p. 405.

(*c*) Of the appeal. See ante, tit. *Sessions*.

I. RELATIVE TO THE SETTLEMENT OF.

(*a*) BY BIRTH AND PARENTAGE.

1. *Of legitimate Children**.

REX *v.* INHABITANTS OF LYTCHET, MATRAVERSE, T. T. 1827. K. B. 7 *B. & C.* 226; S. C. 1 *M. & Ry.* 25.

A son, until emancipated,

A PAUPER, when twenty years of age, hired himself upon a voyage to N.; at the termination of which he became more than of

* By 4 & 5 Will. 4, c. 76, s. 57, "That every man, who, from and after the passing of this act, [14th August, 1834], shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family." But it has been decided that this section has not the effect of conferring upon the children the settlement which the mother acquires by the marriage. (*Rex* v. *Walthamstow*, T. T. 1838, Q. B., 8 Ad. & E. 301).

full age, when he returned to his father, who, in the mean time, had shifted his residence and acquired another settlement.

follows his father's settlement.

The Court held, that the son had not "contracted a relation consistent with the idea of his being part of his father's family," the authority of a parent over his child subsisting until the age of twenty-one, though it may be transferred or delegated for a time; and that the pauper's contract was to be deemed subordinate to the father's controul; and that not being therefore emancipated, his settlement shifted with that of his father.

REX *v.* INHABITANTS OF CATTERALL, E. T. 1817. K. B. 6 *M. & Selw.* 83.

A FATHER'S settlement had been concluded by an order of removal confirmed on an appeal.

And, in a prior case, the same was decided, though emancipated*.

The Court held, that his son's settlement was governed by that adjudication, although emancipated at the time, and not named in the order; having obtained no settlement in his own right.

And see Rex v. *St. Mary, Lambeth*, 6 *T. R.* 615; *Rex* v. *Rudgeley*, 8 *T. R.* 520.

REX *v.* INHABITANTS OF LAWFORD, E. T. 1828. K. B. 8 *B. & C.* 271.

A PAUPER, at the age of fifteen, quitted his father's house, and engaged in the sea-service, occasionally visiting him, but was absent in such service when he attained twenty-one.

A settlement by emancipation continues, though the parent gains a settlement in another parish.

The Court held, that he then became emancipated, and that his settlement was in the place where his father was then settled, and did not afterwards shift with that of the father.

REG. *v.* INHABITANTS OF YEARELEY, M. T. 1838. Q. B. 1 *P. & D.* 60.

To prove an order quashed, a book was produced, purporting to be the original sessions-book, containing the orders and proceedings of the court, made up and recorded after each session by the clerk of the peace from minutes taken by him, and which he considered

The sessions-book is evidence†.

* A settlement by birth is neutralized if the mother has a place of settlement. (*Rex* v. *Inhabitants of St. Mary, Leicester*, T. T. 1835, K. B., 5 N. & M. 215). A pauper hiring herself for a time, but returning home, is emancipated. (*Rex* v. *Inhabitants of Oulton*, E. T. 1834, K. B., 3 N. & M. 62).

An idiot does not become emancipated by attaining the age of twenty-one; and, consequently his settlement continues to follow that of his father, gained after he had attained that age, although he was left by his father before he had attained it. (*Rex* v. *Inhabitants of Much Cowarne*, M. T. 1831, K. B., 2 B. & Ad. 861).

† The register of the marriage, (*Rex* v. *Inhabitants of Lubbenham*, H. T. 1834, K. B., 3 N. & M. 37), or a register of baptism, is not per se evidence of the place of birth. (*Rex* v. *Inhabitants of North Petherton*, E. T. 1826, K. B., 5 B. & C. 508; S. C. 8 D. & R. 325).

The mere fact of a child of the age of four or five years being maintained by a parish until he was thirteen, is not evidence that he was born in the parish. (*Rex* v. *Inhabitants of Trowbridge*, T. T. 1827, K. B., 7 B. & C. 252; S. C. 1 M. & Ry. 7).

On a question of second marriage, the first wife may prove the first marriage. (*Rex* v. *Inhabitants of Bathwick*, T. T. 1831, K. B., 2 B. & Ad. 639).

the record of the proceedings of the court. It had a regular heading and caption. No other record was kept of the proceedings, and it had always been received in that court in evidence to prove them.

The Court held, that it was properly received in evidence by the sessions.

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2. *Of Illegitimate Children*.*

(*b*) By marriage.

REX *v.* INHABITANTS OF TIBSHELF, T. T. 1830. K. B. 1 *B. & Ad.* 190.

The marriage must have been in the proper names†.

THE pauper and her husband were married by banns in the surname of her baptismal register, which appeared by mistake to have been that of her grandfather, and she had never been called or known by it.

The Court held, that, under 26 Geo. 2, c. 33, the marriage was void, and no settlement was gained.

* By 4 & 5 Will. 4, c. 176, it is enacted, "That every child which shall be born a bastard after the passing of this act [14 August, 1834], shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in his own right."

The 4 & 5 Will. 4, c. 76, s. 57, making a bastard part of the family of the mother, if she marries:—Held, to be constructed with reference to the purpose of maintenance only, and not of settlement; and that where the bastard resided apart from the mother, it was removable to the place of birth, and not to the residence of the mother. (*Reg.* v. *Inhabitants of Wendson*, M. T. 1837, Q. B., 3 N. & P. 62).

Where the pauper, a bastard, was born in L., during a wrongful removal of the mother from S.:—Held, that the latter was certainly in law its place of settlement, and the Court would not draw any presumption of forty years' relief by the mother's parish, where the child had followed her during nurture, and afterwards continued, the court of sessions not having so done. (*Rex* v. *Inhabitants of Great Salkeld*, E. T. 1817, K. B., 6 M. & Selw. 208). Where the settlement of the mother of a bastard was in M., but she was removed by an order to L., which was subsequently quashed upon an objection of form and not on the merits, and pending which the pauper was born:—Held, that its settlement was in the removing parish, and not in M. (*Rex* v. *Inhabitants of St. Andrew's, Holborn*, E. T. 1817, K. B., 6 M. & Selw. 411).

A woman, pregnant, was removed from P. to S. The parish of S. appealed, and on the appeal shewed that she was settled at a third parish, M., and the sessions quashed the order of removal; but before the appeal was heard, she was delivered in the parish of S., to which she had been removed, of a bastard:—Held, that the bastard then born was not removable to the parish of M. in which his mother was settled at the time of the removal. (*Rex* v. *Inhabitants of Martlesham*, M. T. 1829, K. B., 10 B. & C. 77). A single woman, pregnant, was removed to her place of settlement. Unknown to the parish officers of either parish, she returned to that from which she had been removed, and was there delivered. The time for appealing against the order of removal had not elapsed when the delivery took place:—Held, that this was within the general rule, and that the child was settled in the parish in which it was born, and not in that in which the mother was settled, and to which she had been removed. (*Rex* v. *Inhabitants of Halifax*, H. T. 1831, K. B., 2 B. & Ad. 211). Where an Irish female pauper, having no settlement in this country, was delivered of a bastard child:—Held, that, under 59 Geo. 3, c. 12, s. 33, the justices could only remove the mother, and not the child, notwithstanding the inconvenience of separating the mother and child. (*Rex* v. *Inhabitants of Benett*, T. T. 1831, K. B., 2 B. & Ad. 712).

† The wife of an Irishman, who has no settlement in England, may, if deserted by him, be removed to her maiden settlement. (*Rex* v. *Inhabitants of Cotting*

(*c*) BY HIRING AND SERVICE*.

1. *Who is a Servant*†.

2. *Of the Contract of Hiring*‡.

ham, M. T. 1827, K. B., 7 B. & C. 615). Where, however, an order was made for the removal of Frances Carstofen (the wife of a Scotchman, who had gained no settlement in England, and was then a lunatic), together with her then children, to the place of her maiden settlement, it was objected that the order was bad on the face of it, as it did not state any desertion of the wife by the husband; but the Court held, that they would not presume that they were living together at the time of the removal, or any other fact which would have the effect of vitiating the order; and as the order stood, it was perfectly consistent with it that they were not living together, or that he was living in the parish to which he was removed. (*Rex* v. *Inhabitants of Shipton*, M. T. 1833, K. B., 5 B. & Ad. 546).

Where a woman, living with her husband, was removed to the place of her maiden settlement, and, upon an appeal against the order, the husband's mother was examined as a witness for the respondents, and upon her cross-examination stated that he was born at Ipswich whilst she and her husband (who was a soldier) were on the march, but in what parish in Ipswich she was delivered she could not tell, nor could she point out the place if she were there:—The Court held, that the order ought to be quashed, for it appeared from the respondents' evidence, that the husband had a settlement in Ipswich, although the exact parish was not known; if indeed this evidence had been given on the part of the appellants, it would have been otherwise, for it would have been incumbent upon them to have proved the exact parish in which the husband was born. (*Rex* v. *Inhabitants of St. Mary, Beverley*, T. T. 1830, K. B., 1 B. & Ad. 201).

* By the 4 & 5 Will. 4, c. 65, it is enacted, "That no person under any contract of hiring and service not completed at the time of the passing of this act shall acquire, or be deemed or adjudged to have acquired, any settlement by reason of such hiring and service, or of any residence under the same."

† The keeper of the Winchester Bridewell had the power of appointment of turnkeys, subject to the approbation and confirmation of the magistrates. The salary was paid by the treasurer of the county, but in all other respects the turnkeys were under the immediate orders of the keeper, and the latter had the power of suspending a turnkey from his office, but could not appoint another in his stead, until an inquiry had been instituted by the visiting justices. The keeper had also a power of dismissing a turnkey for drunkenness:—Held, that a turnkey so appointed, and having remained in his office for a year, gained no settlement by hiring and service. (*Rex* v. *Inhabitants of Sparsholt*, H. T. 1836, K. B., 6 N. & M. 8).

When the question is, whether a contract of apprenticeship or a contract of hiring and service, the point to ascertain appears to be, what was the principal, and what the subordinate, object of the parties, and whether the service was not treated by them as the means of effecting the purpose of apprenticeship. (*Rex* v. *Inhabitants of Tipton*, T. T. 1829, K. B., 9 B. & C. 888). A son may contract with his father so as to constitute a service. (*Rex* v. *Inhabitants of Chillesford*, E. T. 1825, K. B.; 4 B. & C. 94: S. P. *Rex* v. *Inhabitants of Winslow*, E. T. 1825, K. B., 4 B. & C. 94).

‡ Where, by the terms of the contract with the father, the son was to serve the master for a certain period in his business of a wheelwright, at the expiration of the term the master to pay 5*l.* to the son, the father to find his son clothes and other necessaries, and the master meat and lodging:—Held, to amount to a contract of hiring and service only, and not an apprenticeship. (*Rex* v. *Inhabitants of Bilingshay*, M. T. 1836, 1 N. & P. 149).

The stat. 29 Car. 2, c. 7, s. 5, enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling, on the Lord's day, and subjects parties offending to a penalty:—Held, that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling; and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year was valid, and that a service under it conferred a settlement. (*Rex* v. *Inhabitants of Whitnash*, M. T. 1827, K. B., 7 B. & C. 596; S. C. 1 M. & R. 452).

Upon an agreement of hiring as a servant to the Royal College of Sandhurst,

the pauper hiring to give a month's notice, but the College to have a power to dismiss for misconduct, without any notice at all:—Held, that it was not the less a hiring, because it was defeasible, and that, the pauper having performed a year's service under the hiring, a settlement was obtained. (*Rex* v. *Inhabitants of Sandhurst*, M. T. 1827, K. B., 7 B. & C. 557; S. C. 1 My. & Ry. 95).

But where, upon a special case, the court of quarter sessions found, that a pauper hired himself as ostler to an innkeeper, that no earnest or wages were given, but he was to have what he could get as ostler, and that he lodged and boarded in his master's house, and that either the master or servant might have determined the service when they pleased:—It was held, that, upon this finding, this latter stipulation must be taken to have been part of the contract between the parties; and, consequently, that there was not any general and yearly hiring, and that no settlement was gained by serving under it. (*Rex* v. *Inhabitants of St. Bowden*, T. T. 1827, K. B., 7 B. & C. 249; S. C. 1 M. & Ry. 13). When, after hiring for broken periods, upon the offer of the mistress to hire the pauper for a year, the latter agreed, but requiring, at the same time, that she should have two or three days during the year to see her friends, and she had them accordingly, having first asked leave of her mistress, who consented:—Held, that the contract was exceptive. (*Rex* v. *Inhabitants of Leamington Priors*, T. T. 1823, K. B., 8 D. & R. 329). So, where a pauper agreed with an innkeeper to serve him as ostler, at 2*s.* a week in the summer, and 1*s.* 6*d.* a week in the winter:—Held, that this was a weekly hiring only, and that a year's service under it conferred no settlement. (*Rex* v. *Inhabitants of Rolvenden*, H. T. 1828, K. B., 1 M. & Ry. 689). So, service under a yearly hiring to work at a certain trade, and for certain hours is insufficient to confer a settlement, the servant not being under the general controul of the master out of those hours. (*Rex* v. *Inhabitants of Frome Selwood*, T. T. 1830, K. B., 1 B. & Ad. 207). And where in an agreement to work at a particular trade, at weekly wages, it was stipulated, that the pauper was to work from six in the morning until seven in the evening, and might make as much overwork as he chose:—Held, that it was clearly an exception in the contract, limiting the controul of the master to the specific period of time therein mentioned. (*Rex* v. *Inhabitants of Birmingham*, T. T. 1829, K. B., 9 B. & C. 925). And where a pauper hired himself for a year, at 5*l.* wages, to his aunt, who occupied six acres of land; when she had no work for him he was to work for anybody, for his own benefit:—Held, that this was an exceptive hiring, and that service under it did not confer a settlement. (*Rex* v. *Inhabitants of Killingholme*, E. T. 1830, K. B., 10 B. & C. 802). So, where upon the hiring the servant told his master he should want some time to go to his feast, and the master agreed he should have a holiday for that purpose:—Held, to be an exceptive hiring. (*Reg.* v. *Inhabitants of Thockingham*, T. T. 1838, Q. B., 8 Ad. & E. 866). A. hires men from 5th April, 1816, to 5th April, 1817, to hew, work, fill, and drive coals, and to do such other work as shall be necessary for carrying on of A.'s colliery, and as they shall be required and directed to do by A.; the men to receive 2*s.* 6*d.* for each day that they shall be laid idle (be unemployed) by A., except on the pay Saturdays, when the pit is going single shift (working twelve hours); but the pit going double shift, (working twenty-four hours), the men to work one shift, in order to make each shift work eleven days (*i. e.* in a fortnight); and, except when prevented by sickness or other unavoidable cause, to do and perform a full day's work on every working day, except a single shift on the pay-Saturdays; and in default thereof, for every such default to pay 2*s.* 6*d.* to A.:—Held, that in this hiring there was an exception of pay-Saturdays and Sundays, and that therefore no settlement was gained by service under such hiring. (*Rex* v. *Inhabitants of Cowpen*, T. T. 1836, K. B., 6 N. & M. 559; S. C. 5 A. & E. 333). So, a hiring under which the servant is to work ten hours a day, from five in the morning till six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a-day, is an "exceptive hiring." (*Rex* v. *Inhabitants of Norton Bavant*, E. T. 1835, K. B., 4 N. & M. 687). But a contract by a servant to serve cloth merchants for five years, and to do any part of the work the master should think proper; this being done, he was to be paid such and such wages; the hours for working to be from six in the morning until seven in the evening, and to be paid for all over-time, and to have all short time deducted, either in sickness or in health:—Held, by *Denman*, C. J., *Parke*, J., and *Patteson*, J., that this was an absolute hiring; dissentiente *Taunton*, J., who thought it was an exceptive one. (*Rex* v. *Inhabitants of Ossett-cum-Gawthorpe*, M. T. 1832, K. B., 1 N. & M. 21; S. C. 4 B. & Ad. 216). So, where the owner of a colliery entered into a written agreement with certain pitmen, by which the latter agreed to work the colliery, under the direction of the former, upon certain terms, regu-

3. *Of the Year's Service*.*

4. *Of several Hirings, and of the same being continuous†.*

lated by the number of coals produced; there were certain provisions more in detail, including a fine of 1*s.* a day by the men, if on any day they absented themselves, or did not work a reasonable day's work:—Held, that this was not an exceptive hiring, as it did not appear that the master could not have demanded the service at any time during the four-and-twenty hours; and, therefore, that a service under this agreement conferred a settlement. (*Rex* v. *Inhabitants of St. Helen's Auckland*, E. T. 1833, K. B., 1 N. & M. 462).

* A hiring for a year, determinable within the year by matter subsequent, is nevertheless a good hiring for a year within the statute, and service under it for a less period than a year, held to connect with previous service, under a hiring for a less period than a year, and to gain a settlement. (*Rex* v. *Inhabitants of Farleigh Wallop*, T. T. 1830, K. B., 1 B. & Ad. 336). To obtain a settlement by hiring and service for a year, where the year consists of 366 days, as in leap-year, such hiring and service must be for that number of days. (*Rex* v. *Inhabitants of Roxby*, M. T. 1827, K. B., 10 B. & C. 51). So, a hiring to serve from October 13th until October 11th, in the following year, being leap year:—Held insufficient, the statute enacting that such year shall consist of 366 days, and in which the hiring must be for that number of days. (*Rex* v. *Inhabitants of Wormingball*, E. T. 1817, K. B., 6 M. & Selw. 350). Where, upon a hiring for a month on liking, and if he suited to continue during the year, and to have three guineas wages, and at the end of the month the master said that he suited, and might continue, but that he must leave his place a fortnight before the end of the year, in order that he might not be an incumbrance to the parish, which he accordingly did, and the master, as he had behaved well, paid the whole of the wages:—Held, that the settlement failed. (*Rex* v. *Little Coggeshill*, E. T. 1817, K. B., 6 M. & Selw. 264). So, a hiring at 6*s.* a week for the winter, and 9*s.* a week for the summer, nothing being said as to the character of the service, is not a yearly hiring. (*Rex* v. *Inhabitants of Warminster*, M. T. 1826, K. B., 6 B. & C. 77). A hiring for "meat and clothes, as long as the pauper had a mind to stay," is not a yearly hiring. (*Rex* v. *Christ's Parish, in York*, M. T. 1824, K. B., 3 B. & C. 459). But a hiring at so much per week, a month's wages or a month's warning, is a hiring for a year. (*Rex* v. *Inhabitants of St. Andrew's, Pershore*, M. T., 1828, K. B., 8 B. & C., 679).

† Service for less than a year, under a hiring not yearly; then a short interval, during which the service continued, but under no contract of hiring at all; then, the service still continuing, hiring for a year, and service on the whole for a year:—Held, that these services might be connected, and the pauper gained a settlement. (*Rex* v. *Harbury*, T. T. 1830, K. B., 1 B. & Ad. 361). On the 28th of February, 1828, A. was hired as a footman and groom for a year, and served as such in parish M. until the 9th of May, when, by agreement in writing, not under seal, "he engaged to bind himself to serve" his master as overseer and clerk at Berbice. On the 12th of May he left M., and went out with his master to Berbice, but returned with him, and continued to serve his master as his servant during the whole year, and nothing further was done upon the second agreement:—Held, that the second agreement, being merely executory, and nothing having been done upon it, was no dissolution of the former contract of hiring. (*Rex* v. *Inhabitants of Buckingham*, H. T. 1834, K. B., 3 N. & M. 72). A yearly servant left his master's house from illness before the end of the year, and went and resided at his father's house, in a different parish, where he remained to the end of the year. His master supplied him with food and medical attendance for the entire period he was absent, and paid him wages for the whole year:—Held, that the pauper gained a settlement by hiring and service in the parish where he resided during his illness. (*Rex* v. *Inhabitants of East Winch*, M. T. 1840, K. B., 4 P. & D. 342). A yearly servant, who was about to be committed for not paying a fine before a justice, was advised by her mistress not to pay it, and was told to return to her service when the term of her imprisonment should have ended; she did so:—Held, that this was a dispensation of the service for the time passed in prison. (*Rex* v. *Coningsby*, M. T. 1832, K. B., 1 N. & M. 199; S. C. 4 B. & Ad. 156).

A person who had been inrolled a member of a volunteer corps, held to have been in the same situation as a militia man, and incapable, whilst a member of the corps, of entering into a contract of hiring and service, so as to gain a settlement. (*Rex* v. *Inhabitants of Witnesham*, H. T. 1835, K. B., 4 N. & M. 447).

5. *Of the Residence*.*
6. *Of the Evidence†.*
7. *Of the Sessions‡.*

Where the pauper was a volunteer local militia man at the time of hiring himself, which he did not communicate to his master:—Held, that, not being at the time sui juris, there was no lawful hiring to acquire a settlement, the local Militia Act (48 Geo. 3, c. 111, s. 15) applying only to contracts existing at the time of ballot and inrolment, and not to contracts subsequently made. (*Rex* v. *Taunton, St. James*, T. T. 1829, K. B., 9 B. & C. 831). And where A., being inrolled as a substitute in the militia, hired himself for a year, and performed a year's service under that contract:—Held, that, as it did not appear that the pauper, at the time of hiring, informed the master that he was a militia man, no settlement was granted by serving a year under such contract. (*Rex* v. *Holsworthy*, H. T. 1827, K.B., 6 B. & C. 283). But where the pauper, at the time of hiring, informed the master that he had served before in the local militia, and expected to be called out again, and it was agreed that one shilling a day should be deducted from his wages for so long as he should be absent. He was called on to serve, and was absent fourteen days, but returned and served to the end of the year, and his master deducted 14*s.* from the wages:—Held, that there being nothing of absolute exception in the terms of the contract, and the effect of the 52 Geo. 3, c. 38, s. 65, making the absence during the service in the militia in point of law not an absence from the service with the master, a settlement was gained. (*Rex* v. *Inhabitants of Emley Castle*, H. T. 1832, K. B., 3 B. & Ad. 126: S. P. *Rex* v. *Inhabitants of St. Mary, Colchester*, H. T. 1834, K. B., 3 N. & M. 113).

* The forty days' residence during the contract of hiring and service need not be within a year from the time of hiring; but it is sufficient if within the compass of a year. (*Rex* v. *Okeford*, H. T. 1832, K. B., 3 B. & Ad. 809). So, the whole forty days need not be under the last year's hiring. (*Rex* v. *Findon*, E. T. 1825, K. B., 4 B. & C. 91). And where the servant having during the year married, and for the forty nights slept in another parish, where he also slept the last night:—Held, that, although he performed no actual service for his master there, he obtained a settlement in that parish. (*Rex* v. *Inhabitants of Dremenhein*, T. T. 1832, K. B., 3 B. & Ad. 420).

† By written agreement between a man and a woman, the latter was engaged as servant to the former at wages. Before the making of the agreement she and her master had carried on an improper intercourse; that intercourse was continued during the service, but she acted in other respects as, and performed the work of, a servant. Upon a question as to the settlement of the woman:—Held, that evidence was admissible, notwithstanding the written contract of service, to shew that such contract was merely colourable, and that the real contract was for the improper intercourse. (*Rex* v. *Inhabitants of Northwingfield*, H. T. 1831, K. B., 1 B. & Ad. 912). On the question of settlement on hiring and service, it seems, if such a contract be in writing, a parol statement made by the foreman of the factory to the pauper at the time of its execution of the usual number of the working hours during the day, is not admissible in evidence as explanatory of the terms thereof. (*Rex* v. *Inhabitants of St. John, Devizes*, T. T. 1829, K. B., 9 B. & C. 896).

A. for two successive years was hired by B. as a farm servant from a few days after Michaelmas-day until the Michaelmas-day following, at a certain amount of wages for the whole time. A few days after the Michaelmas-day on which the second hiring expired, B. paid A. the wages agreed upon, and asked him if he chose to go on with him, to which A. replied "yes:"—Held, that this conversation was not evidence of a yearly hiring, so that a service under it might be connected with the antecedent service. (*Rex* v. *Inhabitants of Ardington*, E. T. 1833, K. B., 3 N. & M. 304; S. C. 1 Ad. & E. 260).

‡ Where the hiring of the pauper was at first by the week, and continued for eight months, after which the nature of the employment and mode of payment were varied, and the pauper continued to serve for several years:—Held, that whether there was a general hiring or an express hiring for a year was a question entirely for the sessions, and the case was therefore sent back. (*Rex* v. *Inhabitants of Road*, T. T. 1830, K. B., 1 B. & Ad. 362). Where it was made a question of fact at the sessions whether there was a hiring and service for a year in the appellants' parish, and the sessions confirmed the order of removal, subject to the opinion of this court as to a settlement being gained there by hiring and service:—Held, that this amounted to a finding by the justices at sessions that

8. *Of the* 3 *&* 4 *Will.* 4, *c.* 76.

REX *v.* INHABITANTS OF ROTTENDEN, H. T. 1837. K. B. 1 *N. & P.* 448.

A PAUPER, who had served from June, 1833, to Michaelmas, under monthly hirings, was hired at Michaelmas for a year, and served the whole period. The 4 & 5 Will. 4, c. 76, was passed on the 14th of August, 1834.

The hiring and service must have been complete, to come within the 4 & 5 Will. 4.

The Court held, that though a settlement would have been gained previous to that act by such service, it was defeated by the 65th section, the contract for the year's hiring not having been completed at the time of the passing of the act.

REG. *v.* ST. JOHN, THE EVANGELIST, T.T. 1837. K. B. 6 *Ad. & E.* 300, *n.*

SERVICE under a hiring for a year, during which the 4 & 5 Will. 4, c. 76, passed—

The service cannot be united so as to come within the 4 & 5 Will. 4, c. 76*.

The Court held, could not be united with previous service, although completing a year before the passing of the act.

(*d*) BY APPRENTICESHIP†.

there was a hiring and service for a year in that parish, and that such finding ought not to be disturbed by this court if there were sufficient grounds to support it. (*Rex* v. *Inhabitants of St. Andrew's, Cambridge*, M. T., 1828, K. B., 8 B. & C. 664). So, where the court of quarter sessions have found upon a case stated that there was no general hiring, this Court will not disturb their decision if there appear to have been any premises to warrant it. (*Rex* v. *Inhabitants of Rosliston*, M. T. 1828, K. B., 8 B. & C. 668). Where the court of quarter sessions have from facts proved before them drawn the conclusion that there was an implied hiring for a year, this Court will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any facts to justify the finding. (*Rex* v. *Inhabitants of St. Martin's, Leicester*, M. T. 1828, K. B., 8 B. & C. 674). So, where only one instance of relief given whilst the pauper resided out of the parish was proved, and that it had been refused upon a second application, and the sessions found the settlement to be in the relieving parish, the Court refused to reverse that decision. (*Rex* v. *Edwinstowe*, M. T. 1828, K. B., 8 B. & C. 671).

What amounts to a dissolution is purely a question for the sessions. (*Rex* v. *Rottesford*, E. T. 1825, K. B., 4 B. & C. 84).

* The hiring for a year under 3 & 4 Will. & M. c. 11, to confer a settlement by service, need not be by one entire contract; if by any number of contracts the master obtains dominion over the servant for a whole year to come, it is sufficient. (*Reg.* v. *Inhabitants of Ravenstonedale*, E. T. 1840, B. C., 3 P. & D. 469).

Where the ground of appeal was stated to be, that the pauper, at the time when he hired himself (as stated in the examination), and before the completion of the bargain, stipulated with his master, that out of his year's service he should be allowed to have two days' holidays at Spalding club-feast in the month of July, and that the pauper was allowed and did take and absent himself from his master's service during the said two days accordingly:—Held, that it was not competent for the appellants under that notice to prove a bargain for one day's holiday to go to Holbeach fair, and that the pauper had such holiday in pursuance of the bargain. (*Rex* v. *Inhabitants of Holbeach*, M. T., 1836, K. B., 1 N. & P. 137).

† By 4 & 5 Will. 4, c. 76, s. 15, the commissioners are authorized to make rules, orders, and regulations, for "apprenticing the children of poor persons;" and, by sect. 61, the justices who allow the indenture shall previously ascertain whether such rules, &c. have been complied with, and shall certify the same at

1. *Of the Binding necessary.*

1.—*Of the Contract in general*.*

the foot of the indenture, and that the indenture shall not be valid until this be done.

By stat. 4 & 5 Will. 4, c. 76, s. 67, it is enacted, that, from and after the passing of that act [14 August, 1834], no settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, nor by any person now being such an apprentice in respect of such apprenticeship.

* Apprenticeship to a person, who at the time of binding is residing in the parish under a certificate, will not confer a settlement on the person serving under it, although the master afterwards and during the apprenticeship rented a tenement of the annual value of 10*l.* in the parish. (*Rex* v. *Inhabitants of Leeds*, M. T. 1832, K. B., 4 B. & Ad. 248).

An indenture of apprenticeship, or other contract of service, with a chimney-sweeper, is altogether void, if it be not made in conformity with the 28 Geo. 3, c. 48. (*Rex* v. *Inhabitants of Hipswell*, M. T. 1828, K. B., 8 B. & C. 466). The question whether the agreement constitutes a contract of apprenticeship, or of hiring and service, ought to be decided by the sessions. But where the sessions, having decided that it was a contract of hiring and service, granted a special case, the Court, upon the facts found as above, reversed their decision, holding that the agreement was an imperfect contract of apprenticeship. (*Rex* v. *Inhabitants of Ightham*, E. T. 1836, K. B., 4 A. & E. 937: S. C. 6 N. & M. 320). An indenture must be executed. (*Rex* v. *St. Margaret's, King's Lynn*, M. T. 1826, K. B., 6 B. & C. 97). Mere relation of master and servant will not do; the apprentice must be bound. (*Rex* v. *Combe*, E. T. 1828, K. B., 8 B. & C. 82; S. C. 2 M. & Ry. 30). The pauper agreed to learn sawing for a twelvemonth, and was to have 7*s.* 6*d.* out of every 20*s.* he and his master earned. At the end of the year he agreed for another year to receive 8*s.* out of every 20*s.* earned by his master and himself; nothing was said about the hours he was to work, or about Sundays: on Sunday he was occasionally absent without his master. The sessions held this to be a defective contract of apprenticeship, and not a contract of hiring and service; and the court confirmed their order. (*Rex* v. *Crediton*, E. T. 1831, K. B., 2 B. & Ad. 493). Where a pauper applied to a master to take him as an apprentice, and the master said he would not, because if he did he should offend the farmers, but would take him on agreement for four years, and a week afterwards it was agreed between the master and the father-in-law of the pauper, that the pauper should serve the master four years, to learn his trade; to have meat, drink, washing, and lodging the whole time, and 2*s.* 6*d.* a week for the last two years:—Held, that the principal object of the parties being, that the pauper should learn the trade of the master, it was to be deemed a contract of apprenticeship, and not one of hiring and service. (*Rex* v. *Inhabitants of Edingale*, E. T. 1830, K. B., 10 B. & C. 739).

In order to obtain a settlement by binding and inhabitation, under 8 & 9 Will. 4, c. 30, so as to withdraw the party from the effect of a certificate, such binding must be by him when sui juris; when, therefore, he was under age at the time of the executing of the indenture:—Held, that he did not acquire a settlement by service and inhabiting under the indenture after he became of age. (*Rex* v. *Manningtree*, E. T. 1817, K. B., 6 M. & Selw. 214). Where a sum was paid to the master upon the execution of an indenture of apprenticeship, but it was agreed by the mother of the apprentice that something more should be given, and only the sum actually paid at the time was inserted in the indenture as the consideration. The mother afterwards paid the master a further sum; but her husband neither knew the fact of the agreement nor that of the payment of the additional sum. The stamp affixed would have been sufficient if the additional sum had been mentioned:—Held, that, under these circumstances, the indenture was not void for want of the insertion of the true consideration. (*Rex* v. *Inhabitants of Bourton upon Dunsmore*, T. T. 1829, K. B., 9 B. & C. 878). But where the pauper, by an unstamped memorandum, to which his father was a party, agreed to hire himself to his master for three years, and to labour at the art of a weaver, &c. in the usual terms of an apprentice indenture; and the master on his part undertook, as a reward for his honest and faithful labour, to instruct him in such art, and to give him half of his earnings; and at the word "hire," a shilling was given by the master, but there was no premium, and nothing was said as

2.—*Of the Stamp**.

3.—*Of the Date*†.

4.—*Of the Consideration*‡.

5.—*Of the Term* §.

to working on Sundays, but none was ever done, and the pauper was only employed in weaving. The pauper lived and lodged with his father during the whole period, and at the end of two years, upon the removal of his master from the parish, continued to work with his father, also a weaver, until the expiration of the three years:—Held, to be a defective contract of apprenticeship. (*Rex* v. *Inhabitants of Nether Knutsford*, H. T. 1831, K. B., 1 B. & Ad. 726).

Where it appeared that the hiring was for twelve months to learn weaving, and the master agreed to take the pauper and teach him and give him half his earnings, and there was nothing to shew an engagement for service except the finding by the sessions that neither party could rescind the contract:—Held, that it amounted to no more than an imperfect contract of apprenticeship. (*Rex* v. *Inhabitants of Newton*, E. T. 1834, K. B., 3 N. & M. 306; S. C. 1 Ad. & E. 238).

* An indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp. (*Rex* v. *Inhabitants of Louth*, E. T. 1828, K. B., 8 B. & C. 247; S. C. 2 M. & Ry. 273). Where, in order to shew a residing within the respondent parish as an apprentice, with the assent of the master a paper was offered, certifying that the father of the apprentice had agreed to give the master 8*s.* for the time of the apprenticeship:—Held, that there being nothing to shew that the value of the subject-matter of the agreement amounted to 20*l.*, no stamp was requisite. (*Rex* v. *Enderby*, M. T. 1831, K. B., 2 B. & Ad. 205). And where the pauper was bound out by the trustees of a charity, but before the execution of the indenture the father, who was no party to it, agreed with the master to find clothing and washing, the trustees not being privy thereto:—Held, that no stamp was requisite on such indenture in consequence of such agreement, it not being a benefit secured to the master within the 55 Geo. 3, c. 184, sched. p. 1, or if it was, yet it was void as a fraud on the trustees. (*Rex* v. *Inhabitants of Aylesbury*, M. T. 1831, K. B., 3 B. & Ad. 509).

† The indenture is not made void by being antedated, the 8 Ann. c. 9, s. 95, imposing a penalty only, and not including such among the cases in which the act declares them void; and the notice required to be printed at the foot by 5 Geo. 3, c. 46, s. 19, does not of itself operate as an enactment rendering them void. (*Rex* v. *Inhabitants of Harrington*, H. T. 1836, K. B., 6 N. & M. 165; S. C. 4 Ad. & E. 618). But where the sessions found that an indenture, really executed for five years, was antedated so as to appear to be for seven years, fraudulently, for the purpose of evading the 5 Eliz. c. 4, the Court held that they were warranted in finding that the indenture was void, and that no settlement was gained. (*Rex* v. *Inhabitants of Barmston*, H. T. 1838, Q. B., 3 N. & P. 167).

‡ The trustees of a charity bound out an apprentice to B., the consideration money mentioned in the indenture was 10*l.* paid by the trustees. Previously to the execution of the indenture the apprentice's grandfather, who was a party to the indenture, had agreed with the mistress that the premium should be 25*l.*, and subsequently to the execution the grandfather paid to the mistress 15*l.* Of the contract or of the payment of any sum beyond the 10*l.* the trustees were entirely ignorant:—Held, that the agreement by the grandfather to pay the additional sum of 15*l.* was a binding agreement, and that therefore the indenture was void by 8 Ann. c. 9, s. 39, for not stating the full consideration. (*Rex* v. *Inhabitants of Amersham*, H. T. 1836, K. B., 6 N. & M. 12). The mother of the apprentice before the binding agreed with the master to give him 1*l.* in addition to the 4*l.* to be paid by trustees of a charity, and she was a consenting party to the indenture in which only the 4*l.* was stated as the consideration:—Held, that 8 Ann. c. 9, being intended to secure the consideration of the whole sum paid or contracted for with or in relation to the apprenticeship, the indenture was void, and no settlement gained. (*Rex* v. *Inhabitants of Bailden*, M. T. 1831, K. B., 3 B. & Ad. 427).

§ A local act gave power to a corporation to bind out apprentices, "provided the child be not bound for a longer time than until he or she shall have attained a

6.—*As to the Consent of Justices*.*

certain age:"—Held, that an indenture of apprenticeship by which a boy was bound out for a longer time than that mentioned in the proviso was voidable only, and not void, and that he gained a settlement by service under it. (*Rex* v. *Inhabitants of St. Gregory, Canterbury*, M. T. 1834, K. B., 4 N. & M. 137; S. C. 2 Ad. & E. 99).

* Under the 56 Geo. 3, c. 139, s. 2, requiring the allowance of two justices of the county in which the parish of the party to be bound apprentice, and also of two justices of the county in which the apprentice is intended to serve, it is not sufficient that the same persons are justices of each county, the act intending that there should be the allowance of four distinct justices. On demurrer, therefore, to an indictment for not receiving an apprentice:—Held, that the indenture, not being so signed, was void. (*Rex* v. *Inhabitants of Shipton*, M. T. 1821, K. B., 8 B. & C. 772). The 56 Geo. 3, c. 139, s. 11, recited that the salutary provisions enacted by the 43 Eliz. were frequently evaded in the binding out of poor children, and that the premium of apprenticeship was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices of the peace, and then enacted, "That no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved by two justices of the peace under their hands and seals, according to the provisions of the said act and this act:"—Held, that in order to make an indenture, by reason of which any expense had been incurred by the public parochial funds, valid and effectual, the approval of two justices should be under their hands and seals, and that such an indenture approved of by two justices under their hands only was void, and not voidable, and that no settlement was gained by serving under it. (*Rex* v. *Inhabitants of Stoke Damarel*, M. T. 1827, K. B., 7 B. & C. 563; S. C. 1 M. & Ry. 458). Where an apprentice is bound by indenture, to which the parish officers are parties, an allowance by the justices under the 56 Geo. 3, c. 139, will be sufficient, if it be under the hands (without the seals) of the justices. But where an apprentice is bound, and a part of the premium, or any expense in respect of the indenture, comes out of the parish funds, and the parish officers are not parties to the indenture, the allowance in conformity with the above act must be under the seals, as well as the hands, of the justices. (*Rex* v. *St. Paul's, Exeter*, M. T. 1829, K. B., 10 B. & C. 12). The master of a parish apprentice, not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelvemonth for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink; during the third and fourth he received wages:—Held, first, that no settlement was gained by the service with the sister, the service not being under the indentures; and, secondly, that there had been a putting away of the apprentice without the consent of the justices within the meaning of the statute 56 Geo. 3, c. 139, c. 9, and that the pauper did not by his service with the sister gain any settlement by hiring and service. (*Rex* v. *Shipton*, E. T. 1828, K. B., 8 B. & C. 88; S. C. 2 M. & Ry. 217). A person who, of his own accord, was about to bind himself as apprentice, applied to the parish officers, stating that his intended master objected that he had not sufficient clothes; the parish officers thereupon agreed to give him 2*l.* for clothes on the execution of the indenture, and 2*l.* more for the same purpose at the end of the year:—Held, that this was within the stat. 59 Geo. 3, c. 139, s. 11; and that the service under this indenture did not confer a settlement. (*Rex* v. *Inhabitants of Mattishall*, M.T. 1828, K.B., 8 B. & C. 733). Upon the construction of 56 Geo. 3, c. 139, s. 1:—Held that the justices have a general discretion to exercise as to the binding, and not the fitness respectively of the master and apprentice only; where the justices had considered the place in reference to the propriety of binding, and refused to allow the indentures, the Court refused a mandamus. (*Rex* v. *Mills*, H. T. 1831, K. B., 2 B. & Ad. 578). An indenture of apprenticeship was allowed by two justices, describing themselves as justices of the peace of the said county, dwelling in or near the said parish; the county last mentioned was a county in respect of which they would not have jurisdiction over the subject-matter; but the parish last mentioned had been described as in a county in respect of which they would have jurisdiction:—Held, that the expression, taken entire, sufficiently referred to the county which gave them jurisdiction, although, according to a strict grammatical construction, the word "said" referred to the

7.—As to Parish Officers, Charities, and Corporations.*

8.—Where Contract made in Foreign Country†.

9.—Effect of Fraud ‡.

county last antecedent. (*Rex* v. *Inhabitants of Countesthorpe*, E.T. 1831, K. B., 2 B. & Ad. 487). Where certain lands were devised, half of the rents to be applied for the relief of widows, and the other half in binding out apprentices; and accounts were kept of the funds by the churchwardens distinct from the poor-rates; other lands were also devised to the churchwardens and overseers, to be applied in educating poor boys, and also apprenticing a certain number, to be chosen by the churchwardens, overseers, and principal inhabitants:—Held, that neither of the funds was to be deemed "public parochial funds," within the 56 Geo. 3, c. 139, s. 11, avoiding the indentures for want of the approval of justices. (*Rex* v. *Halesworth*, E. T. 1832, K. B., 3 B. & Ad. 717). The premium for an apprenticeship was paid by the trustees of a charitable fund. On the day of the binding the apprentice was provided with a suit of clothes by the parish officers, in contemplation of the binding, but without any express stipulation to that effect:—Held, that this was not an expense within 56 Geo. 3, c. 139, s. 11, making requisite the assent of two justices to the indenture. (*Rex* v. *Inhabitants of Quainton*, E. T. 1834, K. B., 3 N. & M. 289; S. C. 1 Ad. & E. 133).

Although it may be essential to the validity of an order of justices, under 56 Geo. 3, c. 139, s. 2, that notice should have been given to the overseers of the parish in which a child is intended to serve its apprenticeship; yet where an indenture has been allowed by the justices, it is to be presumed that such notice had been given before the allowance of the indenture, and it is not necessary for the party relying upon the indenture at the sessions to prove such notice to have been given. (*Rex* v. *Inhabitants of Whiston*, H. T. 1836, K. B., 6 N. & M. 65).

Where a parish indenture of apprenticeship appears on the face of it to be ordered and allowed by justices under 56 Geo. 3, c. 139, s. 2, it is primâ facie to be presumed that the notice required by that section was duly given, and was proved before the magistrates by whom the indenture was allowed. (*Rex* v. *Inhabitants of Witney*, T. T. 1836, K. B., 5 Ad. & E. 191; S. C. 6 N. & M. 552).

* Where it is proposed to bind an apprentice under the 56 Geo. 3, c. 139, notice is necessary to be given to the parish officers of the parish into which it is proposed to bind, although the justices have jurisdiction over both parishes, and they are in the same county. (*Rex* v. *Inhabitants of Threlkeld*, M. T. 1839, K. B., 1 N. & M. 14; S. C. 4 B. & Ad. 229). The churchwardens and overseers may bind, notwithstanding the 22 Geo. 3, c. 83, as to the guardians being empowered. (*Rex* v. *Lutterworth*, M. T. 1824, K. B., 3 B. & C. 487; S. C. 5 D. & R. 343). A local act incorporated certain persons by the name of "The guardians of the poor within the hundred of Stow, in the county of Suffolk;" there was a power to the body at large to elect directors and acting guardians, for putting the powers of the act in execution; the directors and acting guardians were empowered to bind out poor children:— Held, that such binding should be in the name of the corporation by its corporate name; and that a binding by deed, by "the directors and acting guardians," to which deed the corporate seal was affixed, was invalid. (*Rex* v. *Inhabitants of Haughley*, E. T. 1833, K. B., 1 N. & M. 525). A subscription was raised to apprentice a poor person, to which the parish officers of another parish were invited to contribute, and they did contribute, denying, however, that the person belonged to their parish; and three other parishes contributed, [the contributions of the latter being paid out of the parish funds]; the remainder of the money being raised by private subscription. None of the parish officers took any part in the treaty or the agreement for the apprenticeship, or in any way interfered in the transaction:—Held, that this was not a case within 56 Geo. 3, c. 139, s. 11, so as to require that the indenture of apprenticeship should be allowed by two justices. (*Rex* v. *Inhabitants of St. Peter's, Hereford*, H. T. 1831, K. B., 1 B. & Ad. 916).

† An indenture of apprenticeship was made in Newfoundland by an English sailor, who thereby agreed to serve on board his master's ship:—Held, that a settlement was gained by a service and inhabitancy in England for forty days under that indenture. (*Rex* v. *Inhabitants of Closworth*, H. T. 1837, K. B., 1 N. & P. 437).

‡ Notwithstanding a fraud on the parish officers, a settlement may be gained. (*Rex* v. *Inhabitants of Great Sheepy*, E. T. 1828, K. B., 8 B. & C. 74; S. C. 2 M. & Ry. 286).

2. *Of the Service*.*

* Where the party appeared to have been bound to P., in respect of W.'s estate, but the pauper never served P., nor did the latter execute the indenture; the pauper served W., but it did not even appear that there had been any communication between W. and P.:—Held, that it could not be deemed a service under the indenture; the sessions ought to find the facts of the assignment and consent, and not leave it for the inference of the Court. (*Rex* v. *Inhabitants of St. Cuthbert, Wells*, H. T. 1834, K. B., 3 N. & M. 100). So, the 10 Geo. 2, c. 31, prohibiting a waterman or his widow from taking an apprentice, unless he or she were the occupier of the house to lodge the apprentice, and also the taking of more than two apprentices by such party, under certain penalties:—Held, that a binding to the widow of a waterman not occupying such a house, but upon an understanding that the apprentice was to live at the house of a waterman (a foreman), and serve him, in conformity with the indenture, he having at the time two other apprentices, was, as a prohibited contract, absolutely void, and no settlement was thereby obtained. (*Rex* v. *Inhabitants of Gravesend*, T. T. 1832, K. B., 3 B. & Ad. 240). So, where the pauper was bound apprentice to J. and W. M., who were partners. After a time, J. and W. M. dissolved partnership, and J. M. took into partnership P., and they continued to carry on the same business. The pauper continued to serve with J. M. and P. till the death of J. M., and afterwards with P. alone; but it did not appear that W. M. knew any thing of the partnership between J. M. and P., or that he ever gave his assent to the pauper's serving with P.:—Held, that the residence of the pauper with P., after the death of J. M., could not be considered as a residence which had reference to the indenture; and that, therefore, the pauper gained no settlement thereby. (*Rex* v. *Inhabitants of St. Martin, Exeter*, H. T. 1835, K. B., 4 N. & M. 388). A., a parish apprentice, having a general permission from B., his master, to seek employment in trade elsewhere, serves C. in the parish of Dale, and resides there forty days before the 1st October, 1816, (when the 56 Geo. 3, c. 139, came into operation), without the knowledge of B. B., subsequently to 6th October, assents to such service:—Held, that such subsequent assent to the service with C. does not relate back to the commencement of it, so as to make the service in Dale referable to the indenture. (*Rex* v. *Inhabitants of Maidstone*, T. T. 1836, K. B., 6 N. & M. 545; S. C. 5 A. & E. 326). So, where a master, not having sufficient employment for a parish apprentice, agreed with another person in the same trade with himself, but in a different parish, that the apprentice should work for him, he paying to the first master 5*s.* a-week. The apprentice worked accordingly, and lived with the second master for about three years, and until the expiration of his indenture, except for an interval of ten days, when his first master, who was ill, sent for him back:—Held, that this was a putting away of the apprentice without the consent of the justices, within 56 Geo. 3, c. 139, s. 9, and that no settlement was gained in the parish of the second master. (*Reg.* v. *Inhabitants of Wainfleet, All-Saints*, M. T. 1839, Q. B., 3 P. & D. 72). But, where an apprentice was told by his master that he had no work for him to do, and that he had better see if he could get a place, and that one B., a person of the same trade, wanted hands. The apprentice went and engaged, with the consent of his master, to work for B. at the trade, being paid by the piece. Subsequently, the apprentice learning that he could get better pay from another person in the same trade, wrote to his old master for leave, and received verbal leave. He agreed with and worked for that person for a considerable time, supporting himself by what he received from his earnings:—Held, (by *Denman*, C. J., *Littledale* and *Patteson*, Js.), that the residences, while in these services, were under the indenture, and sufficient to confer a settlement; *Parke*, J., dissentiente. (*Rex* v. *Inhabitants of Banbury*, E. T. 1833, K. B., 3 B. & Ad. 706). And, where the pauper was bound apprentice to his father-in-law, and resided with him during the indentures, a settlement is gained, although the pauper never served his master at his trade, or was instructed by him. (*Reg.* v. *Inhabitants of Burslem*, M. T. 1839, Q. B., 3 P. & D. 38). So, where the pauper returned to his father in consequence of illness, and resided above forty days, until the indentures were cancelled, during which time his master occasionally visited him, and asked him to carry about and sell tickets for the disposal of articles manufactured by him, by way of lottery, giving him 1*s.* a ticket:—Held, that such residence and service were connected with the apprenticeship, and a settlement gained in the father's parish, and was not affected by any illegality of such employment. (*Reg.* v. *Inhabitants of Somerley*, E. T. 1839, Q. B., 1 P. & D. 180). And, where an apprentice, after sleeping thirty-five nights in the master's parish, went a voyage with him, and, on his master's ab-

3. *Of the Assignment*.*

sconding, returned in the vessel to the same parish, and was sent by the master's wife, in consequence of illness, to the poor-house, where he was maintained by her for three weeks:—Held, that such was virtually a residence in the master's house under a continuance of the contract, and acquired a settlement. (*Rex* v. *Inhabitants of Foulness*, E. T. 1817, K. B., 6 M. & Selw. 351). And so, the apprentice sleeping Saturday and Sunday nights at his parents does not avoid the service. (*Rex* v. *Ilkestone*, E. T. 1825, K. B., 4 B. & C. 64).

* A second apprenticeship, unless the first is legally dissolved, is not valid so as to confer a settlement. (*Rex* v. *Inhabitants of Wigston*, M. T. 1824, K. B., 3 B. & C. 484; S. C. 5 D. & R. 339). And where a parish apprentice, after serving several years, was put by his master to serve the remainder of his time with another master in the same trade; and, after staying a few days on trial, continued with him for three weeks, when the original indenture was given up to the new master, and a new indenture was entered into between the pauper, his father, and the master, for a longer period, and containing different provisions, and without any reference to the original indenture:—Held, that the second service being inconsistent with and in a different character from the first, was to be considered referable to the engagement with the second master, and not under the original one, and no settlement gained thereby. (*Rex* v. *Inhabitants of Ecclesfield*, E. T. 1817, K. B., 6 M. & Selw. 173). But, where an apprentice serves a second master, with the express consent of his first master, under such circumstances as shew that the service is in furtherance of the covenants of the indenture, he will gain a settlement by such service, though the second master does not know that he is an apprentice. (*Rex* v. *Inhabitants of Sandhurst*, H. T. 1837, K. B., 1 N. & P. 176). And, where the pauper, a parish apprentice to a farmer, upon the failure of his master, before the expiration of the apprenticeship, was by him placed with another farmer in another parish, where the pauper continued nine months, when, being disabled by illness, he returned to his former master, who told him to go and reside with his mother and he would remunerate her; and he also sent him to a medical man for advice; and he so resided during more than twenty days, but did not perform any actual service for his master:—Held, that he was to be deemed residing there as an apprentice, and thereby gained a settlement. (*Rex* v. *Inhabitants of Linkinghorne*, E. T. 1832, K.B., 3 B. & Ad.413).

A. is apprenticed to B., to be by B. instructed in his trade, and provided with meat and other necessaries. B. having no employment for A., advises him to go to work with C. at the same trade, and promises to give A. a watch if A. will not trouble him or the parish till the end of his time. A. accordingly applies to C., who employs him at piece-work, out of which A. provides himself with necessaries. A. afterwards, with the assent of B., removes from the service of A. into that of D., where he serves in the same trade. At the end of the period for which he was apprenticed, A. receives the watch, in pursuance of the promise:—Held, (by *Denman*, C. J., *Littledale*, J., and *Patteson*, J., dissentiente *Park*, J.), that the service with C. and D. was referable to the indenture, and that A. gained a settlement in the parish in which he inhabited during such service. (*Rex* v. *Inhabitants of Banbury*, T. T. 1833, K. B., 2 N. & M. 105; S. C. 5 B. & Ad. 176). Where the apprentice was originally bound to a landowner residing out of the kingdom, but was accepted, and the indenture signed by his steward, and the latter afterwards assigned the apprentice, with the approbation of two justices, to another master:—Held, that, supposing a master might delegate his power of assigning, yet that there must be an express authority for it; and the steward having no previous authority to assign, it was irregular. (*Rex* v. *Inhabitants of Spreyton*, T. T. 1832, K. B., 3 B. & Ad. 818).

The assignment of a parish apprentice, held not within the 8 Anne, c. 9, ss. 35, 39, requiring the consideration to be stated, and to be stamped within two months of the execution. (*Rex* v. *Inhabitants of Ide*, T. T. 1831, K. B., 2 B. & Ad. 866). The assignment of a parish indenture stated the consideration money to the new master to have been paid by the old master:—Held, that, nevertheless, parol evidence was admissible, to shew that the money came out of the parish fund, in order to exempt the instrument from the stamp-duty, under the 55 Geo. 3, c. 184, schedule, part 1, title "Apprentice." (*Rex* v. *Inhabitants of Llangunnor*, E. T. 1831, K. B., 2 B. & Ad. 616).

A parish apprentice, named Elizabeth Matthews, was assigned by her master, Thomas Melhuish, and an acceptance by her new master of the said Elizabeth Matthews was indorsed on the assignment, pursuant to the 32 Geo. 3, c. 57. Where a parish apprentice is assigned from one parish to a master in another parish, it

4. *Of the Dissolution* *.

5. *Of the Evidence* †.

(*e*) By renting a tenement ‡.

1. *In General, and Construction of Statutes* §.

is not necessary to give notice of such assignment to the overseers of the latter parish, according to the 56 Geo. 3. c. 139. (*Rex* v. *Inhabitants of Exminster*, E. T. 1837, K. B., 1 N. & P. 603).

* An apprentice, about two years after the contract of apprenticeship was entered into, left his master, and was afterwards found by him working for his father; upon which it was agreed between the master and the father that the apprentice should be given up to the father in consideration of four guineas, to be paid on the 16th of August then next (the agreement being in May), on which day the money was paid, and the indentures delivered up:—Held, that, if this was any dissolution of the contract of apprenticeship, it was prospective only to take effect on the money being paid on the 16th of August; and the apprentice gained a settlement by service under the indenture in the mean time. (*Rex* v. *Inhabitants of Gwinear*, E. T. 1834, K. B., 3 N. & M. 297; S. C. 1 A. & E. 152).

† Where it had not been proved that the indentures had ever been in the hands of the pauper's husband (the supposed apprentice), nor had any inquiry been made of other parties:—Held, that a conversation between the pauper and her deceased husband as to their contents and loss was inadmissible, nor would the Court send back the case to have it re-stated. (*Rex* v. *Inhabitants of Rawden*, M. T. 1834, K. B., 4 N. & M. 97; S. C. 2 A. & E. 156). A mere statement by parish officers that they have not the indenture will not admit parol evidence. (*Rex* v. *Inhabitants of Denio*, M. T. 1827, K. B., 7 B. & C. 620; S. C. 1 M. & Ry. 294). But if the indenture cannot be found in the parish-chest, the presumption is it is lost, so as to admit parol evidence. (*Rex* v. *Inhabitants of Stourbridge*, E. T. 1828, K. B., 8 B. & C. 96; S. C. 2 M. & Ry. 43). A verbal agreement does not vary the indenture. (*Rex* v. *Inhabitants of Warden*, E. T. 1828, K. B., 2 M. & Ry. 24).

‡ By 4 & 5 Will. 4, c. 76, s. 66, it is enacted, "That from and after the passing of this act [14th August, 1834] no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same in respect of such tenement for one year."

§ The words "coming to settle," in 13 & 14 Car. 2, c. 12, do not mean a coming with an intention of permanently settling. Where the pauper, in 1814, entered into a contract, by which he was to live a month on trial without paying rent, and, if it suited, then to take the premises for a year, which he accordingly did, and he resided a month after the expiration of the first month:—Held, that he thereby gained a settlement. (*Rex* v. *Inhabitants of Helsham*, T. T. 1831, K. B., 2 B. & Ad. 620). Under 6 Geo. 4, a dwelling-house in one part of a parish, hired of a person at a rent less than 10*l.* a year, and a building in another part of the parish, hired of another person at a rent less than 10*l.* a year, but the combined rents exceeding 10*l.*, may be united for the purpose of satisfying the requisites of the 6 Geo. 4, c. 57, in order to obtain a settlement. (*Rex* v. *Inhabitants of Tadcaster*, E. T. 1833, K. B., 1 N. & M. 466). Under 6 Geo. 4, c. 57, the words, "for the term of one whole year at the least," are not to be confined to one branch of the sentence; and, consequently, the rent actually received must be paid for one whole year at the least; where, therefore, part only of the rent, though exceeding 10*l.*, had been paid:—Held, that no settlement was obtained. (*Rex* v. *Inhabitants of Ramsgate*, E. T. 1827, K. B., 6 B. & C. 712). In December, 1825, a house was hired at 20 guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter-day:—Held, that this was a renting of a tenement for one whole year, within the meaning of the stat. 6 Geo. 4, c. 57; and that the pauper, having occupied the same, and paid the rent for a year, gained a settlement. (*Rex* v. *Inhabitants of Herstmonceaux*, M. T. 1827, K. B., 7 B. & C. 551; S. C. 1 M. & Ry. 426). But, where the pauper rented a cot-

2. *As to the kind of Tenement.*

1.—*In General* *.

tage of 7*l.* per annum for two years, 1824 and 1825, and at Michaelmas, 1824, took some pasture ground for a year, at 8*l.*, but at the Lady-day following he under-let it to his brother until the following Michaelmas, who occupied the land, and paid the last half-year's rent:—Held, that, not having been, in fact, occupying the land at the time the 59 Geo. 3 expired (June 22, 1825), he could not acquire a settlement under that act; and that the 6 Geo. 4, c. 57, operating at the latter quarter of the year, could not have a retrospective effect, the pauper's occupation having been discontinued when it came into operation. (*Rex* v. *Inhabitants of Ackley*, H. T. 1831, K. B., 1 B. & Ad. 1818). The 1 Will. 4, c. 18, declaring that payment of rent to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under 6 Geo. 4, c. 57, is retrospective; where, therefore, the pauper, in 1834, hired premises at a rent above 10*l.*, and occupied them for more than a year, and paid above 10*l.*, though not the full year's rent:—Held, sufficient to gain a settlement. (*Rex* v. *Inhabitants of Dunley*, T. T. 1832, K. B., 3 B. & Ad. 465).

Where a shepherd served a farmer for two years, under an agreement for "12*s.* per week, and to have twenty-one ewes grazing:"—Held, that this contract only gave the shepherd a right to have his ewes fed, in the same manner as his master's flock, either on pasture or on dry food; and, therefore, that the pauper did not gain a settlement, although the feed of the ewes was worth more than 10*l.* a year, it not being any part of the bargain that the sheep should be pasture-fed. (*Rex* v. *Inhabitants of Thornham*, E. T. 1827, K. B., 6 B. & C. 733).

* Where the house was demised with fixtures at a rent of 10*l.*, and the tenant paid rates for it at an assessment below 10*l.*; but if any deduction were to be made in respect of the latter, the sessions found, that the tenement was not of the annual value of 10*l.*:—The Court held, that, the articles having been found to have been fixed to the freehold taken by the tenant as the property of the landlord, they constituted parcel of the tenement; and the pauper, having paid rates for a tenement of the yearly value of 10*l.*, obtained a settlement. (*Rex* v. *Inhabitants of St. Dunstan, Kent*, M. T. 1825, K. B., 4 B. & C. 686; S. C. 7 D. & R. 128). A butcher agreed to occupy a stall in a market at 2*s.* 6*d.* per week. The stall was a permanent building, with a door capable of being locked, and the key was in his possession; but he had a right of access to the stall on two days in the week only. On other days the market was closed. The pauper used the stall on the market-days for a period of nineteen weeks, and paid rent for that time:—Held, that he had occupied the stall for thirty-eight days only, and therefore gained no settlement. Semble, that this was a coming to settle upon a tenement within the stat. 13 & 14 Car. 2, c. 12, s. 1. (*Rex* v. *Inhabitants of Caversham*, M. T. 1825, K. B., 4 B. & C. 683; S. C. 7 D. & R. 160). So, where a pauper rented a cottage of a person, who kept a flax-mill near it, at which six of his children worked, having been engaged for three years. It was agreed that 2*s.* per week was to be paid for the use of the cottage, which was to be deducted from the children's wages, one of whom continued to work at the mill after his father had ceased to occupy the cottage. The sessions found, that though the pauper, who was a husbandman, occasionally worked for the mistress of the mill, he was not her servant:—Held, that the sessions were justified in finding that the pauper gained a settlement by renting this tenement; *Coleridge*, J., hæsitante. (*Reg.* v. *Inhabitants of Bishopton*, H. T. 1839, 9 A. & E. 824; S. C. 1 P. & D. 598). And where the case found that the pauper hired a house of sufficient value for a year, and occupied it until within a few weeks of the end of the year, when he abandoned it, and went to another residence, paying the whole year's rent, and the premises were occupied by another; but it did not appear how the succeeding occupier came in:—Held, that *abandoning* did not determine the tenancy, and unless a surrender took place, or the succeeding occupier was let into possession by the tenant, his interest did not cease until the year expired; and that a settlement was therefore obtained. (*Rex* v. *Inhabitants of Stow Bardolph*, T. T. 1830, K. B., 1 B. & Ad. 219). So, where a party took a house, buildings, and land for a year, at 10*l.*, the landlord discharging all taxes and payments, occupied for a year, and paid that rent:—Held, that he gained a settlement, though the landlord paid 6*s.* for tithes

2.—*As to the Contract, and relation of Landlord and Tenant*.*

due in respect of these premises. (*Reg.* v. *Inhabitants of St. John's, Bedwardine*, E. T. 1838, Q. B., 3 N. & P. 362). And where a house consisted of three floors, and the access to each was by separate outer door:—Held, that the occupier of one floor had a distinct tenement within the statute. (*Rex* v. *Inhabitants of Usworth and Biddock*, T. T. 1836, K. B., 5 Ad. & E. 261). So, where the pauper rented two parts of the house, divided by a passage, being all under one roof, and a garret extending over both, but there was no external communication, and he afterwards put a journeyman into one part, who paid for it a weekly rent:—Held, that as it must be taken to be one distinct building, it was sufficient to satisfy the 6 Geo. 4, c. 57, and that a settlement was acquired. (*Rex* v. *Inhabitants of Macclesfield*, M. T. 1831, K. B., 2 B. & Ad. 870). So, an upper granary, forming an entire floor over another granary in a yard belonging to a dwelling-house, both granaries adjoining to and under the same roof with a stable, but detached from the dwelling-house:—Held, not to be a separate and distinct building, within the 59 Geo. 3, c. 50, though there was no internal communication from one granary to the other, nor between the granary and the stable, but the only means of access was by a moveable ladder from the yard. (*Rex* v. *Inhabitants of Henley-upon-Thames*, H. T. 1837, K. B., 1 N. & P. 415).

Where the pauper agreed to take potato ground, which the landlord was, by ploughing and manure, to make worth the rent of 12*l.*:—Held, that, although such improvements were not made until after the pauper came to settle, it was sufficient within 13 & 14 Car. 2, c. 12, and that a settlement was obtained. (*Rex* v. *Inhabitants of Huntsham*, E. T. 1831, K. B., 2 B. & Ad. 503). But a mill of wood, resting upon a foundation of brick, but not attached to the foundation, held not to be part of a tenement; and, consequently, being rented with a cottage and garden, which, with the mill, were worth 30*l.* a year, but without it less than 10*l.*:—Held, that no settlement was gained by renting the tenement. (*Rex* v. *Inhabitants of Otley*, T. T. 1830, K. B., 1 B. & Ad. 161). And where the lessee of tolls and a toll-house of a navigation underlet the same for the remainder of a term of three years, at the annual rent of 42*l.*, and the under-lessee occupied them for upwards of a year, and paid a year's rent; and it was found as a fact that the toll-house had always been used as a public-house, as well as for the collection of tolls, and was worth 25*l.* a year, if let as a public-house without the tolls, and 4*l.* a year if not so let: it was held, that the under-lessee did not gain any settlement by the renting of a tenement, inasmuch as he was a person renting the tolls, and residing in a toll-house of a navigation, within the 54 Geo. 3, c. 170, s. 5. (*Rex* v. *Inhabitants of St. Andrew the Less, Cambridge*, E. T. 1830, K. B., 10 B. & C. 742).

A pauper agent renting a tenement is sufficient. (*Rex* v. *Inhabitants of Chediston*, E. T. 1825, K. B., 4 B. & C. 230).

* Where the pauper had contracted for so much land at —— per perch, which was to be made of that value by manure to be supplied by the landlord, and which was not furnished until after the holding had commenced:—Held, that what was contracted for before the entry to be done by the landlord, and was afterwards done in pursuance of the contract, might be considered as done at the time of the entry, and the value, so thereby improved, being sufficient to raise the rent to 10*l.*, a settlement was acquired. (*Rex* v. *Inhabitants of Poulton-with-Flamhead*, E. T. 1817, K. B., 6 M. & Selw. 252). And a party by whom a tenement is hired and occupied, and the rent paid for a year, gains a settlement under 59 Geo. 3, c. 50, although a third person be surety to the landlord for payment of the rent. (*Rex* v. *Inhabitants of Kegworth*, E. T. 1828, K. B., 2 M. & Ry. 28). A case stated that the pauper, in 1817, was engaged by a master to take care of his stock on certain marshes; and it was agreed that he should receive 12*s.* a week wages, the keep of one cow, four sheep, and two pigs, on the marshes, and should occupy a house rent free, situate there, which had always been appropriated to the person who looked after the stock. The pauper was to go into the house at Michaelmas, and, at the time when he commenced taking care of the stock, it was stipulated that he should not be obliged to leave the house unless he had notice to quit at Michaelmas. He took charge of the stock, and had possession of the house for nine years, and during that time had no other employment than the taking care of this stock. The sessions having found that the occupation by him was in the character of a servant, the Court refused to set aside that finding. (*Rex* v. *Inhabitants of Snape*, H. T. 1837, K. B., 1 N. & P. 429). But where, after an agreement for the service of the pauper (working kilns), by a new agreement it was stipulated that

3.—As to several Tenements.*

4.—As to Underletting†.

5.—Effect of Assignment to Creditors ‡.

the pauper should pay a certain sum after each burning for the use of the kiln, &c., which, together with a cottage, were found by the sessions to have been worth above 10*l.* per annum; and he was to have the property in the articles manufactured:—Held, that as he could not do so without having the use and occupation of the kilns, &c., and being in no way referable to any service, the relation of landlord and tenant existed, and a settlement was obtained. (*Rex* v. *Inhabitants of Iken*, M. T. 1834, K. B., 4 N. & M. 117; S. C. 2 B. & Ad. 147, questioning *Rex* v. *Inhabitants of Hammersmith*, 8 T. R. 450, n.).

* Renting two distinct dwelling-houses at 6*l.* a year rent each, confers a settlement under 6 Geo. 4, c. 57, although only one is occupied by the party himself, and he lets off the other. (*Rex* v. *Inhabitants of Iver*, H. T. 1834, K. B., 3 N. & M. 28; S. C. 1 Ad. & E. 228). So, where, from the year 1811, the pauper occupied a cottage and a ferry in the appellant parish for eight years, at the annual rent of 9*l.* 10*s.*; he also had, for the purposes of the ferry, the use of a boat and line, the value of which was not found by the sessions. He moreover occupied in the same parish, during one of these years, a garden, for which he paid 10*s.*:—Held, that he gained a settlement under the stat. 13 & 14 Car. 2, c. 12. (*Reg.* v. *Inhabitants of Fladbury*, E. T. 1839, Q. B., 2 P. & D. 471). And where the pauper hired a house and stable, entirely separate, but in the same parish, and under different landlords, together amounting to 10*l.*:—Held, that, under 59 Geo. 3, c. 50, a settlement was gained by residing in the house for a year, and paying the whole rent. (*Rex* v. *Inhabitants of Gosforth*, E. T. 1834, K. B., 3 N. & M. 303; S. C. 1 Ad. & E. 226). So, renting two distinct dwelling-houses, one at the rent of 8*l.*, another at the rent of 5*l.*, confers a settlement under 6 Geo. 4, c. 57, although only one is occupied by the party himself, and he lets off the other. (*Rex* v. *Inhabitants of Wootton*, E. T. 1834, K. B., 3 N. & M. 312; S. C. 1 Ad. & E. 232).

Different hirings may be connected so as to constitute the term. (*Rex* v. *Stow*, E. T. 1825, K. B., 4 B. & C. 87). But the 59 Geo. 3, c. 50, was repealed by 6 Geo. 4, c. 57, which enacted, "That no settlement shall be gained by renting or paying rates in respect of a tenement, not being the party's own property, unless such tenement shall consist of a separate and distinct dwelling-house, or building, or of land, or of both, bonâ fide rented by such person in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of one whole year, nor unless such house, or building, or land, shall be occupied under such quarterly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least: Provided always, that it shall not be necessary to prove the actual value of such tenement."

† In order to gain a settlement under the 6 Geo. 4, c. 57, the house or land need not be entirely occupied by the tenant for the year. If he hold the whole, and underlet a part, he occupying the remainder, it will be sufficient. (*Rex* v. *Inhabitants of Great Bentley*, H. T. 1830, K. B., 10 B. & C. 520). A party hiring and residing in a house of sufficient value for a year, held not to defeat a settlement under 1 Will. 4, c. 18, by permitting persons to occupy beds for the night, where he retained the control over the whole house. (*Rex* v. *Inhabitants of St. Giles-in-the-Fields*, H. T. 1836, K. B., 6 N. & M. 5). In order to gain a settlement by renting a tenement, since the stat. 1 Will. 4, c. 18, the person renting it must be in the actual occupation of the whole house. Where, therefore, the pauper let part to a person who had the exclusive occupation of that part for three weeks:—Held, that he gained no settlement. The statute applies equally to a case where the agreement was entered into, and the occupation under it commenced, previous to the passing of 1 Will. 4, c. 18, as to one where the agreement was made after the passing of the act. (*Rex* v. *Inhabitants of St. Nicholas, Colchester*, H. T. 1835, K. B., 4 N. & M. 422; supporting *Rex* v. *St. Nicholas, Rochester*, T. T. 1833, K. B., 5 B. & Ad. 219)

‡ A pauper rented a tenement for a year, but paid no rent. Before the expiration of the year he conveyed all his farming implements, stock, crops, and all other his personal estate to one T. W. for the benefit of his creditors. T. W. sold under that deed; and out of the proceeds of the sale paid the rent due to the landlord:—Held, that there was not such an occupation by the pauper as to enable him to gain a settlement, the effect of the deed being to give to the purchasers of the crops a concurrent, if not exclusive, right of occupation:—Held,

also, that the payment of the rent by the trustee out of the proceeds of the sale could not be considered as a payment made by him for the pauper. (*Rex* v. *Inhabitants of Pakefield*, H. T. 1836, K. B., 6 N. & M. 16).

* A pauper rented a dwelling-house in the parish of B., at 7*l.* per annum, from the year 1828 to 1831, inclusive, and occupied it for one whole year at the least; he also rented and occupied a tenement jointly with another person, in the same parish, at the rent of 15*l.* per annum, during all the time that he rented and occupied the said dwelling-house:—Held, that he did not gain a settlement under 6 Geo. 4, c. 57. (*Reg.* v. *Inhabitants of Caverswall*, E. T. 1839, K. B., 1 P. & D. 426). Upon a joint letting to two of premises at the rent of 18*l.*, though one only occupied and was rated:—Held, that each, for the purpose of settlement, must be considered as holding only a moiety; and, (per *Patteson*, J.), evidence that it was intended that the pauper should be the sub-tenant, and the other a surety, was not admissible, although between the parties it might. (*Rex* v. *Inhabitants of Great Wakering*, H. T. 1834, K. B., 3 N. & M. 47).

† To gain a settlement by the renting of a tenement in respect of the feed of cattle, it is necessary not only that they should be pasture-fed, but that it was a part of the contract that they should be so fed. (*Rex* v. *Inhabitants of Langriville*, E. T. 1830, K. B., 10 B. & C. 899). The actual value of the tenement is immaterial, with reference to the act of 59 Geo. 3, c. 50, if the taking &c. be bonâ fide. (*Rex* v. *Inhabitants of Ashfield-cum-Thorpe*, T. T. 1830, K. B., 9 B. & C. 939). The stat. 59 Geo. 3, c. 50, makes the payment of a year's rent by the person hiring a tenement a condition precedent to the gaining of a settlement by reason of dwelling therein for forty days. The stat. 6 Geo. 4, c. 57, repeals that statute, but still makes the payment of the year's rent, but not by the party hiring the same, a condition precedent to the gaining a settlement. (*Rex* v. *Inhabitants of Carshalton*, M. T. 1826, K. B., 6 B. & C. 93). Since the stat. 6 Geo. 4, c. 57, in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year (whatever be its amount) must be paid. (*Rex* v. *Inhabitants of Ashley Hay*, E. T. 1828, K. B., 8 B. & C. 27; S. C. 2 M. & Ry. 21). To acquire a settlement by renting a tenement, under 6 Geo. 4, c. 57, the renting need be bonâ fide only as between the landlord and tenant: and the whole rent need not be paid by the person renting the tenement; it is enough if it be actually paid. (*Rex* v. *Inhabitants of Kibworth Harcourt*, H. T. 1828, K. B., 1 M. & Ry. 691). Under 6 Geo. 4, c. 57, a settlement may be gained by hiring a tenement, if the rent be actually paid to the landlord, whether it be paid by the tenant or by another person. (*Rex* v. *Inhabitants of Ruthin*, T. T. 1833, K. B., 2 N. & M. 97; S. C. 5 B. & Ad. 215). Where a pauper, bonâ fide, hired a house and garden in A. for a year, at the rent of 10*l.*, and occupied it for a year, and the whole rent was paid to the landlord, but not by the pauper:—Held, that he nevertheless gained a settlement in A., inasmuch as the stat. 6 Geo. 4, c. 57, did not require that the rent should be paid by him. (*Rex* v. *Inhabitants of Kibworth Harcourt*, H. T. 1828, K. B., 7 B. & C. 790; *Rex* v. *Inhabitants of Thurmaston*, H. T. 1831, K. B., 1 B. & Ad. 721). But, where the sessions having found that the parish officers of a parish in which a pauper was settled fraudulently gave him money to enable him to pay his rent, in order that he might, under 6 Geo. 4, c. 57, gain a settlement in another parish:—Held, that no settlement was gained by renting the tenement and payment of the rent under such circumstances. (*Rex* v. *Inhabitants of St. Sepulchre, Cambridge*, H. T. 1831, K. B., 1 B. & Ad. 924; *Rex* v. *Inhabitants of Merthyr Tydvil*, T. T. 1830, K. B., 1 B. & Ad. 29). The 1 Will. 4, c. 18, declaring that payment of rent to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under 6 Geo. 4, c. 57, is retrospective. Where, therefore, the pauper, in 1824, hired premises at a rent above 10*l.*, and occupied them for more than a year, and paid above 10*l.*, though not the full year's rent:—Held sufficient to gain a settlement. (*Rex* v. *Inhabitants of Nacton*, T. T. 1832, K. B., 3 B. & Ad. 543).

The value is estimated at the time of the entry. (*Rex* v. *Acton*, E. T. 1817, K. B., 6 M. & Selw. 54).

‡ To gain a settlement under 13 & 14 Car. 2, c. 12, by coming to settle in a tenement, it is not necessary that the party occupy as tenant. Before 59 Geo. 3, c. 50, a curate, therefore, gained a settlement by residing forty days in the rectory house under an agreement, by which such residence was to form part of his re-

5. *As to the Residence*.*

muneration, and with the license of the bishop under 57 Geo. 3, c. 99. (*Rex* v. *Inhabitants of St. Mary, Newington*, M. T. 1833, K. B., 2 N. & M. 357; S. C. 2 B. & Ad. 540). Where the party taking the house died a few days before the expiration of the year, though his corpse remained in the house after, and his widow continued to reside and paid the year's rent, held that the latter gained no settlement. (*Rex* v. *Inhabitants of Crayford*, M. T. 1826, K. B., 6 B. & C. 68). But under an agreement for tenancy of a cottage and land for a year, at a rent exceeding 10*l.*, where it was agreed that the land should be entered at Lady-day, and the cottage not until the May-day in the same year; entry, occupation, and payment of rent accordingly:—Held, sufficient to confer a settlement. (*Rex* v. *Inhabitants of Ormesby*, M. T. 1832, K. B., 1 N. & M. 27; S. C. 4 B. & Ad. 214).

Under 59 Geo. 3, c. 50, requiring that the house or building shall be held, and the land occupied:—Held, that a settlement was gained by the pauper, who hired and held a separate and distinct dwelling-house, although he underlet part of the house. (*Rex* v. *Inhabitants of Great Bolton*, E. T. 1828, K. B., 8 B. & C. 71; S. C. 2 M. & Ry. 227). But, where a pauper held a house at the annual rent of 8*l.* from Lady-day to Michaelmas 1821, and a different house from Michaelmas 1821 to Lady-day 1822, at the annual rent of 9*l.*; and during the whole of that period he was the tenant of a garden at the annual rent of two guineas, but he had agreed with another person that they should share the expense and the profits arising from the cultivation of the garden, and that person paid him half of the rent, but he paid the whole to the landlord: it was held, that he did not gain a settlement, because he did not, during the whole year, as required by the 59 Geo. 3, c. 50, hold a house and occupy land which, together, were of the annual value of 10*l.* (*Rex* v. *Inhabitants of Tonbridge*, M. T. 1826, K. B., 6 B. & C. 88; see *Rex* v. *North Collingham*, 1 B. & C. 578).

The 6 Geo. 4, c. 57, being silent as to the occupation of the tenement and payment of rent by the "person hiring," but only that it should be occupied under such yearly hiring:—Held, (per *Littledale* and *Parke*, Js., contrà *Bayley*, J.), that it was sufficient to gain a settlement, although the party hiring underlet part of the premises, he having resided forty days therein; and that it is to be deemed an occupation by the party hiring, if the premises continue in the occupation of any person entitled under the tenancy created by the yearly hiring. (*Rex* v. *Inhabitants of Ditcheat*, H. T. 1829, K. B., 9 B. & C. 176). By 1 Will. 4, c. 18, no person to acquire a settlement by reason of yearly hiring a tenement, or land, unless the party actually hiring the same shall occupy under such yearly hiring for one whole year, and pay a rent for the same to the amount of 10*l.*, at the least. A. lets a house for a year at 20*l.* to B.; B. underlets for a year at the same rent to C., who occupies during the whole year; in the middle of the year B. surrenders to A., who accepts C. for his immediate tenant, upon a new demise from year to year from A. to C.; C. gains no settlement under 1 Will. 4, c. 18. (*Rex* v. *Inhabitants of Banbury*, E. T. 1834, K. B., 3 N. & M. 292; S. C. 1 Ad. & E. 136). But upon the construction of 1 Will. 4, c. 18, the subject-matter which forms the tenement must be occupied; where, therefore, the pauper hired two cottages and three acres of land, at an entire rent, and let off one, the one he occupied himself, with the land, being of the value of 10*l.*:—Held, insufficient to gain a settlement. (*Rex* v. *Inhabitants of Berkswell*, H. T. 1837, K. B., 1 N. & P. 432), And where the pauper had underlet a part:—Held, insufficient, and that the value of the part occupied by the pauper could not be taken into consideration. (*Rex* v. *Inhabitants of St. Nicholas, Rochester*, H. T. 1834, K. B., 3 N. & M. 21; S. C. 5 B. & Ad. 219).

* Under 13 & 14 Car. 2, where the pauper occupied one tenement as a tenant, and rented another of more than 10*l.* annual value:—Held, that it was not necessary to his gaining a settlement that he should have resided on any part of it. (*Rex* v. *Churchwardens of Kenardington*, M. T. 1826, K. B., 6 B. & C. 70; see *Rex* v. *Inhabitants of Benneworth*, 2 B. & C. 775; semble, overruling *Rex* v. *Inhabitants of Bardwell*, 2 B. & C. 161, and *Rex* v. *Shipdam*, cited, Ib. notis).

Under 59 Geo. 3, the occupation of a tenement antecedent to an order of removal may be connected with an occupation of the same tenement subsequent thereto, so as to confer a settlement under the stat. 59 Geo. 3, c. 50. (*Rex* v. *Inhabitants of Barham*, E. T. 1828, K. B., 8 B. & C. 99). Since the 59 Geo. 3, c. 50, a settlement may be gained by a residence of forty days in a parish, provided the party comply with the conditions mentioned in that act. (*Rex* v. *Inhabitants of Wainfleet*, E. T. 1828, K. B., 8 B. & C. 227; S. C. 2 M. & Ry. 223).

A man rented a tenement at 10*l.* a year in A., and occupied for seven months,

6. *As to the Evidence**.

(*f*) By paying rates and taxes†.

Rex *v.* Inhabitants of Christchurch, M. T. 1828. K. B. 8 *B. & C.* 660.

The rate must be parochial‡;

The pauper was rated to and paid ward-rate for the city of London, under the 10 Geo. 2, c. 22, s. 2.

at the end of which an order for his removal to B. was made, but suspended by reason of his sickness, during which he continued to occupy the tenement; afterwards he was removed to B., but returned on the same day to A., and continued to reside until the expiration of more than twelve months from the commencement of his occupation:—Held, that the occupation was, for the purposes of settlement, interrupted by the residence under the suspension of the order, and that, therefore, no settlement was gained:—Held, also, that the execution of the order by actual removal was, under the circumstances, no interruption of the occupation. (*Rex* v. *Inhabitants of St. John, Hackney*, H. T. 1835, K. B., 4 N. & M. 336). A pauper hired a tenement from Michaelmas 1832 to Michaelmas 1833, at 17*l.* per annum. He paid half a year's rent in July, and occupied the house for the whole year. He continued to occupy the house until the 6th of December, 1833, when he was removed by an order of removal to another parish. He subsequently paid his second half-year's rent, having returned to the house on December the 8th, and continued there till the 27th of January following:—Held, that by payment of that half-year's rent he gained a settlement subsequent to the order of removal, which was conclusive only of the place of settlement at the time when it was made; and that it could not have the effect of extinguishing the contract between the pauper and his landlord, so as to prevent the former from gaining a settlement by payment of the rent afterwards. (*Rex* v. *Inhabitants of Willoughby*, M. T. 1835, K. B., 5 N. & M. 457). When a tenement has been taken at an entire rent, for a sum exceeding 10*l.* a year, part of the tenement being in one parish and part in another, the tenant has gained a settlement in the parish in which is that part wherein he resided, provided, on apportioning the rent, it appears he paid 10*l.* a year for the part which is in that parish. (*Rex* v. *Inhabitants of Pickering*, E. T. 1831, K. B., 2 B. & Ad. 267).

* The facts of occupation and payment of rent will be sufficient to raise a presumption that the person who so occupied and paid was the tenant; and, for the purpose of raising merely this presumption, those facts may be ascertained by parol, although the tenancy was under a written agreement, which is not produced. But if it be sought to carry this presumption any further, or to alter it, by shewing either the terms of such a tenancy or that the person who so appeared to be tenant was a tenant with others, the written agreement must be produced. (*Rex* v. *Inhabitants of Rawden*, M. T. 1828, K. B., 8 B. & C. 708). Where, upon cross-examination of the pauper, he admitted that he had occupied and paid rent for a tenement in the respondent parish, but that the terms of the contract were in writing:—Held, that the proof by parol of the facts shewing a tenancy was receivable, although the contents of the contract were not. (*Rex* v. *Inhabitants of Hull*, M. T. 1827, K. B., 1 M. & Ry. 444).

† By 6 Geo. 4, c, 57, (which came into operation on the 22nd June, 1825), it is enacted, by sect. 2, "That no person shall acquire a settlement in any parish or township, maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person in such parish or township at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house, or building, or land shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid for the term of one whole year at the least: Provided always, that it shall not be necessary to prove the actual value of such tenement, anything in any act or acts, or any construction of or implication from any act or acts, or any usage or custom to the contrary notwithstanding."

Where the occupation of the tenement rated is such as to satisfy the provisions of 6 Geo. 4, c. 57:—Held, that the settlement is not affected by the 1 Will. 4, c. 18. (*Rex* v. *Inhabitants of Stoke Damarel*, H. T. 1837, K. B., 1 N. & P. 453).

‡ The payment of rates having been substituted for the notice required by

The Court held, this did not confer a settlement under the 3 Will. 3, c. 11, as the rate must be a parochial tax.

Rex *v.* Inhabitants of St. Ann's, Blackfriars, M. T. 1828. K. B. 3 *M. & Ry.* 383.

On a settlement case—

and for benefit of parish at large.

The Court held, that payment of rates for watching a ward in London, not being beneficial for the parish at large, nor collected by parish officers, cannot be deemed notice to the parish within the principle of 3 Will. & M. c. 11; and that it is therefore insufficient to gain a settlement.

Rex *v.* Inhabitants of East Teignmouth, T. T. 1830. K. B. 1 *B. & Ad.* 244.

The land-tax will not do.

The words "parochial rates," in 6 Geo. 4, c. 57, s. 2, are not to be confined in construction to the rates or taxes raised for the purposes of the parish, but import taxes raised within the parish.

The Court held, therefore, that the payment of the land-tax did not confer a settlement.

Rex *v.* Inhabitants of Lower Heyford, T. T. 1830. K. B. 1 *B. & Ad.* 75.

The relation of landlord and tenant need not exist.

A clerk to an attorney was permitted to reside in a cottage and land of his employer, for the more convenient attendance on business, holding rent-free as an increase of salary, was rated as the occupier, and occasionally paid the rates, although always reimbursed by his employer, and quitted the premises, when required, without any notice.

The Court held, that he was to be deemed as having been charged with and having paid towards the public taxes, and that he had thereby gained a settlement under the 3 Will. & M. c. 11, it not being necessary that the relation of landlord and tenant should exist.

Rex *v.* Inhabitants of Penryn, M. T. 1832. K. B. 1 *N. & M.* 74; S. C. 4 *B. & Ad.* 224, *supporting* Rex *v.* St. Pancras, 2 *B. & C.* 122, *and* Rex *v.* Lower Heyford, *Burr. S. C.* 649, *overruling* Rex *v.* Islington, 1 *East*, 283, *and* Rex *v.* Penryn, 5 *M. & Selw.* 443.

Paying rates on the whole premises suffices.

A pauper occupied part of a dwelling-house divided into five tenements, the whole of the value of 16*l.*, but the part occupied by him of less than 10*l.*; and, by agreement with the landlord, he was rated to and paid the rates for the whole.

The Court held that he gained a settlement.

3 Will. & M. c. 11, under which forty days' residence was necessary after delivering such notice before a settlement can be gained:—Held, that there must be a forty days' residence after the charge and payment of the rate. Where, therefore, the forty days had not elapsed before the passing of the 6 Geo. 4, c. 57:—Held, that no settlement was gained by mere payment of rates in respect of a tenement worth 10*l.*, but not occupied for the whole year. (*Rex* v. *Inhabitants of Ringstead*, M. T. 1827, K. B., 7 B. & C. 607; S. C. 1 M. & Ry. 448).

REG. *v.* INHABITANTS OF ST. MARY KALENDAR, II. T. 1839. Q. B. 1 *P. & D.* 497; S. C. 9 *Ad. & E.* 626.

If the rates be paid, the time of occupation is not material.

A PAUPER hired a house after the 6 Geo. 4, c. 57, at a yearly rent of 16*l.*, payable quarterly, the tenancy to be determinable at a quarter's notice. At the end of the first quarter his rent was reduced, he having given notice that he would quit. He resided in the house until the 26th of September, when he and his family removed to another house, keeping the key of the former, and leaving some trifling articles therein until the 5th of October, when his tenancy expired. On the 29th of September a poor-rate was made, was allowed on the 1st of October, and published on the 9th of October. This rate the pauper had not paid, though he had paid other rates made and wherein he was assessed during the year.

The Court held, that he gained a settlement by payment of rates, there being a sufficient yearly hiring and occupation for a year to satisfy the 6 Geo. 4, c. 76, s. 66, which requires a party to be rated and to have paid all the poor-rates in respect of the premises, not applying to settlements acquired by payment of rates.

(*g*) BY POSSESSING AN ESTATE.

1. *As to the Kind of Estate**.

* Where the pauper agreed for the purchase of a copyhold tenement for 150*l.*, and paid 34*l.*, but there was no surrender ever made, nor agreement in writing, and the pauper, after having been half a year in possession, upon a dispute as to the payment of the residue, agreed to rescind the contract upon receiving back 14*l.* of the sum he had paid:—Held, that it could not be considered a purchase within the 9 Geo. 1, c. 7, s. 5, which requires that the entire consideration should be paid, or at least be ready to be satisfied; and, in a case of doubtful equity whether the party were entitled to have a performance of the purchase decreed, the court of quarter sessions were not bound to enter into or discuss it. (*Rex* v. *Inhabitants of Long Bennington*, E. T. 1817, K. B., 6 M. & Selw. 403). So, where, upon articles of agreement (for inclosure) between the lord and tenants, an allotment had been made for the former, in trust for the shepherd of the common sheep flock of the tenantry farmers, and the pauper had been engaged as shepherd, first, for eleven months at 14*s.* per week, and to have the shepherd's croft (the allotment), which was to make up as good as 16*s.*; after serving that period, he was again hired for one month, and afterwards "to go on again upon the same terms," under which he served a year:—Held, that the latter, as a general hiring, amounted to a yearly hiring and gained a settlement; but that the occupation of the land depending, not on the articles of agreement, but on the contract of hiring, it was not therefore a settlement by estate, but a coming to settle on a tenement under 10*l.* a year, and insufficient for the purpose of a settlement. (*Rex* v. *Inhabitants of South Newton*, E. T. 1830, K. B., 10 B. & C. 838). And, where a corporation was seised of certain lands, which were let, and the rents apportioned amongst the burgesses, as the corporation might think fit to allow them:—Held, that, the burgesses having no right to enter on the land or occupy it, no settlement was gained in respect of such interest. (*Rex* v. *Inhabitants of Belford*, M. T. 1829, K. B., 10 B. & C. 54). And, where the pauper's father having purchased a cottage for 40*l.*, by a verbal agreement with his son, the pauper, in consideration of 24*l.* which the father owed him, he the pauper was put into possession and received the rent for three years, when, by indenture between the pauper, his father, and a purchaser, reciting that the father, in consideration of love and affection and of the debt owing to his son, had, by parol and without any conveyance put him into possession, and that the son had contracted to sell the same, and by his direction, &c. the father had agreed to convey &c., the pauper and his father entered into the usual covenants to the purchaser:—Held, that there never having been any conveyance to the son, the pauper had only an

equitable interest, which could not be grounded on natural love, and that the interest, if he had any, rested on the pecuniary consideration, which was less than 30*l.* (*Rex* v. *Inhabitants of Piddlehinton*, T. T. 1832, K. B., 3 B. & A. 460). But, where a father in his lifetime gave up copyhold premises to the pauper, his heir, in his lifetime, in consideration of his paying off a debt of 15*l.*, and permitting the father and mother to reside thereon during their lives, and the son was duly admitted:—Held, not a pecuniary purchase within the statute. (*Rex* v. *Inhabitants of Hatfield, Broad Oak*, T. T. 1832, K. B., 3 B. & Ad. 566). A payment of expenses to the pauper's attorney forms no part of the sum within the 9 Geo. 1, c. 7. (*Rex* v. *Inhabitants of Cottingham*, H. T. 1828, K. B., 7 B. & C. 603; S. C. 1 M. & Ry. 469). To confer a settlement by estate it must not be an estate acquired by purchase. (*Rex* v. *Inhabitants of Great Driffield*, M. T. 1828, K. B., 8 B. & C. 684, distinguishing the cases of *Burdear* v. *Eastwoodhey*, 1 Str. 163, and Burr. Sett. Ca. 221; *Rex* v. *Cold Ashton*, 2 Bott, 530; and *Rex* v. *Upton*, 3 T. R. 251; and overruling *Rex* v. *Stansfield*, Burr. Sett. Ca. 205; *Rex* v. *Deddington*, Id. 220; *Rex* v. *Long Wittenham*, 2 Bott, 531; *Rex* v. *Warblington*, 1 T. R. 241). An equitable estate is sufficient to confer a settlement, but the purchase must be complete. (*Rex* v. *Inhabitants of Llantillio Grossenny*, E. T. 1826, K. B., 5 B. & C. 461; S. C. 8 D. & R. 320). And the pauper must have an immediate interest. (*Rex* v. *Inhabitants of Ringstead*, H. T. 1829, K. B., 9 B. & C. 218). An estate in remainder will not confer a settlement. (*Rex* v. *Inhabitants of Willoughby*, M. T. 1829, K. B., 10 B. & C. 62),

But where the pauper takes an estate for life defeasible, residence upon the premises for 40 days after the death of the testator confers a settlement. (*Rex* v. *Inhabitants of Cassington*, M. T. 1831, K. B., 2 B. & Ad. 874). So, also, a pauper, seised in fee of freehold and copyhold lands, conveyed his freehold lands to trustees for sale, and covenanted to surrender his copyhold lands to them, or to any person whom they should appoint. The trustees were to pay his debts with the proceeds, and any surplus to him:—Held, that he gained a settlement by residing in the parish where the copyhold lands were situated, for forty days after the execution of the covenant. (*Rex* v. *Inhabitants of Aslackby*, T. T. 1836, K. B., 6 N. & M. 582; S. C. 2 A. & E. 200). And, where the pauper, being seised of freehold and copyhold lands in the parish wherein he resided, conveyed them to trustees for sale and payment of his debts, and to pay any surplus to him, with covenants to surrender the lands, and before any surrender to any purchaser he resided about forty days within the parish, but not on any part of the property:—Held, that, having the legal estate, he gained a settlement by such residence. (*Rex* v. *Inhabitants of Ardleigh*, T. T. 1837, K. B., 2 N. & P. 240). When it is the duty of a party to take out letters of administration, his settlement in A., where the estate of the intestate lies, is not vitiated, by shewing, that administration was taken out at the sole instance of the parish officers of B., for the purpose of transferring the settlement of the party from B. to A. (*Rex* v. *Inhabitants of Great Glenn*, T. T. 1833, K. B., 2 N. & M. 91; S. C. 5 B. & Ad. 188). And, where a pauper, having a fourth share in an equity of redemption of certain leasehold property, had, before residing in the parish, verbally agreed to assign all his interest to another; and, by subsequent assignment, the different parties who were entitled to a share (among them the pauper) in consideration of 30*l.* assigned to the person to whom the pauper had before by parol conveyed his share, and no money passed from that person to the pauper:—Held, that he had parted with his equity of redemption before he came to reside in the parish, and gained no settlement. (*Rex* v. *Inhabitants of Cregrina*, H. T. 1835, K. B., 4 N. & M. 455). So, a devisee of a copyhold has, before admittance, such an equitable interest in the copyhold property as to be irremovable, and if he reside forty days within the parish will gain a settlement; *Parke*, J., dissentiente. (*Rex* v. *Inhabitants of Thruscross*, E. T. 1834, K. B., 3 N. & M. 284; S. C. 1 Ad. & E. 126). Where the pauper, having a cottage originally built on the waste conveyed to him from the lord for a small sum, sold it for 40*l.* and a lease to him and his wife for their joint lives at a yearly rent of 40*s.*, which being unable to pay the lessor took possession of it and the lease was destroyed, but the pauper's furniture and his former lodger continued in the cottage:—Held, that the life interest never having been legally put an end to, and the wife never consenting, they continued irremovable, and he obtained a settlement, although he had actually become chargeable. (*Rex* v. *Inhabitants of Matlock*, E. T. 1834, K. B., 1 Ad. & E. 124).

The holding over for twenty years by lessee for years determinable on lives at a nominal rent, who, at the commencement of such holding over, falsely asserts that one of the cestuis que vies is alive, but omits to pay the reserved rent, is not

2. *Of the Construction of Statutes* *.

3. *Of the Value* †.

4. *Of the Occupation and Residence* ‡.

an adverse possession barring the entry or ejectment of the reversioner, and although the reversioner has notice of the cesser of the term, and grants a fresh lease to another person, who neglects to enter for more than twenty years. (*Rex* v. *Inhabitants of Axbridge*, H. T. 1835, K. B., 4 N. & M. 477; S. C. 2 Ad. & E. 108). Where land is taken by encroachment and inclosed, the occasional throwing down of the inclosures will not alter the character of the possession, so as to render it no longer adverse, if in all other respects the possession be adverse. (*Rex* v. *Inhabitants of Wooburn*, E. T. 1830, K. B., 10 B. & C. 846). W. B., about fifty years before, went, on the invitation of W. P., whose daughter he had married, to live in the house of W. P. The house was held by W. P. for a term determinable upon lives. W. P., thirty-eight years before, died intestate, leaving a widow, several sons, and a daughter, the wife of W. B. No letters of administration to W. P. were ever taken out; but W. B. continued in possession of a part of the premises which he had in the lifetime of W. P. parted off, the sons taking possession of the other premises, and he and the sons paid the rent in shares, but not bearing the same proportion to their share of the father's property, in case there had been a legal distribution. One of the sons afterwards went away, and W. P. took possession of his portion, and paid his share of the rent:—Held, first, that this possession was not adverse; secondly, that no grant to W. B. could be presumed, as there had been no letters of administration, and there was no person who could legally make a grant; consequently W. B. gained no settlement by estate. (*Rex* v. *Inhabitants of Okeford, Fitzpaine*, T. T. 1830, K. B., 1 B. & Ad. 254). Where the pauper's father, having purchased a cottage for 49*l.*, by a verbal agreement with his son, the pauper, in consideration of 24*l.* which the father owed him, was put into possession, and received the rent for three years, when, by indentures between the pauper, his father, and a purchaser, reciting that the father, in consideration of love and affection, and of the debt owing to his son, had, by parol, and without any conveyance, put him into possession, and that the son having contracted to sell the same, and by his direction, &c., the father had agreed to convey, &c., the pauper and his father entered into the usual covenants to the purchaser:—Held, that there never having been any conveyance to the son, the pauper had only an equitable interest, which could not be grounded on natural love, and that the interest, if he had any, rested only on the pecuniary consideration, which was less than 30*l.* (*Rex* v. *Inhabitants of Pensax*, M. T. 1832, K. B., 3 B. & Ad. 815).

* A surrender to the lord of an old lease by one member of a family, and the taking of a new lease by another member, at a nominal fine to the lord, is not a purchase within the 9 Geo. 1, c. 7, although the property be under the value of 30*l.* (*Rex* v. *Inhabitants of Lydlinch*, M. T. 1832, K. B., 1 N. & M. 33; S. C. 4 B. & Ad. 150).

† A., being seised in fee of a close of land, gave a small piece by parol to B., who built a cottage on it, and resided in it fifteen years, when A. told him he had sold the land to C., and asked B. to give him possession, and to sell him his right; A. agreed to give 3*l.* for giving possession, and that B. should take the materials; B. pulled down the cottage, and carried away the materials, and delivered possession to C.:—Held, that B. did not gain any settlement by residing in the house. (*Rex* v. *Inhabitants of Chew*, E. T. 1833, K. B., 10 B. & C. 747). But a man by marrying a woman who is a yearly tenant of premises under the annual value of 10*l.*, held to gain a settlement. (*Rex* v. *Inhabitants of Ynyscynhanarn*, T. T. 1827, K. B., 7 B. & C. 233; S. C. 1 M. & Ry. 16).

‡ Where the pauper's father, after the death of T. W., thirty-seven years before, whose daughter he had married, continued to live in the house held by his father-in-law on lease determinable on lives, but no letters of administration had ever been taken out, and T. W. had left a widow and son besides the pauper's mother:—Held, that the court of quarter sessions not having drawn the presumption that administration had been granted, and the facts tending against it, the Court could not infer it, so as to establish a settlement by such occupation. (*Rex* v. *Inhabitants of Carford Magna*, E. T. 1817, K. B., 6 M. & Selw. 355). Where an estate was devised to a child at the age of sixteen, living with her father, and

5. *As to Husband and Wife's Interest*.*

6. *Evidence of†.*

(*h*) By serving an office ‡.

he went with her to reside thereon:—Held, that not being guardian in socage, but merely a natural guardian, and as such having no interest in the land, he acquired no settlement in respect of such residence on the estate. (*Rex* v. *Inhabitants of Sherrington*, M. T. 1832, K. B., 3 B. & Ad. 714).

*A matrimonial right in respect of the wife's husband's interest is sufficient. (*Rex* v. *Inhabitants of Brinyton*, H. T. 1828, K. B., 7 B. & C. 546; S. C. 1 M. & Ry. 431). And where the wife having, before marriage, an interest as yearly tenant:—Held, that the husband, acquiring that interest by operation of law, by forty days residing thereon, acquired a settlement, although the rent was less than 10*l.* per annum. (*Rex* v. *Cerney*, T. T. 1832, K. B., 3 B. & Ad. 463). But, where a woman, being yearly tenant at 50*s.* a year, marries, her husband, by forty days' residence on the premises, gains a settlement by estate. But, where a man, being yearly tenant, dies, and his wife occupies, and pays rent as one of the next of kin, but without taking out letters of administration, the wife neither gains a settlement herself, nor is a settlement gained by a second husband by reason of his marriage with her during such occupation, and of forty days' residence. (*Rex* v. *Inhabitants of Barnard Castle*, M. T. 1834, K. B., 4 N. & M. 128).

† Where, the father of the pauper's wife being seised in fee, and having several children, it was agreed among them, in his lifetime, that a part of the land should be allotted to each, which was afterwards staked out; the pauper built a cottage on his wife's part, and after residing thereon seventeen years sold it for 60*l.*; in answer to this case, and in order to shew that the pauper acquired his part by purchase, for a less consideration than 30*l.*, a deed was put in between the pauper and the wife's eldest brother, reciting an agreement to purchase it of the latter for two years:—Held, that evidence was admissible to shew that no consideration was ever paid, and that the object of the deed was merely voluntary, to confirm the pauper's title, and was not a purchase for a pecuniary consideration. (*Rex* v. *Inhabitants of Cheadle*, M. T. 1832, K. B., 3 B. & A. 833). But, where the pauper's father had purchased a freehold, situate in the parish of B., and resided a sufficient time, the conveyance set out the premises with abuttals, but described it as in the parish of S.:—Held, that it was competent to the respondents, being no parties to the deed, to shew by parol evidence that no part of the premises was within the parish of S. (*Rex* v. *Inhabitants of Wickham*, H. T. 1835, K. B., 4 N. & M. 406).

‡ By 4 & 5 Will. 4, c. 76, s. 64, it is enacted, "That from and after the passing of this act no settlement shall be gained by serving an office."

The appointment must have been a valid one. (*Rex* v. *Inhabitants of Hambledon*, T. T. 1825, K. B., 4 B. & C. 459; S. C. 6 D. & R. 554). And under the 3 & 4 Will. & M., c. 11, the person must be legally placed in the office according to the 9 & 10 Will. 3, c. 11, (although he be not residing in the parish under a certificate), the two statutes being considered as in pari materiâ. (*Rex* v. *Inhabitants of Corfe*, T. T. 1830, K. B., 1 B. & Ad. 211). And there must be a residence in a parish to which the duty of the office refers. (*Rex* v. *Woodbridge*, E. T. 1833, K. B., 1 N. & M. 457). Whether the office of pinder is a public annual office for the purpose of settlement, —quære. Where a person served such an office by desire of persons in the parish, (in which there had been no such office before), and by their desire was sworn in before a justice:—Held, that this was not a sufficient appointment to the office for the purpose of settlement. (*Rex* v. *Inhabitants of Clixby*, M. T. 1832, K. B., 1 N. & M. 118; S. C. 4 B. & Ad. 153). So, where a person performed the duties of the office of parish clerk, and received a yearly salary for several years, not having been chosen to the office by the vicar, nor appointed in any manner whatever:—Held, that he had not executed the office according to the 3 Will. & M., so as to gain a settlement. (*Rex* v. *Inhabitants of Stogursey*, H. T. 1831, K. B., 1 B. & Ad. 795). So, no settlement is gained by the execution of an office (e. g. that of pinder) for a town to which the party is appointed at a court held within and for a manor, which manor does not extend over the whole

(*i*) By certificate.

Rex *v.* Inhabitants of Queenborough, E. T. 1831. K. B. 2 *B. & Ad.* 219.

The certificate cannot be retrospective.

The son of a certificated person was bound apprentice, and served a considerable time in the certified parish, after which he was removed by an order to the certifying parish, who received him for some time, and he then returned to his master, and served out his time, residing more than forty days under the indenture subsequently to such return.

The Court held, that, as the original binding was not valid for the purpose of conferring a settlement in the certificated parish, no subsequent act of the certifying parish could have the retrospective effect of making it available.

Rex *v.* Inhabitants of Whitchurch, M. T. 1827. K. B. 7 *B. & C.* 573; S. C. 1 *M. & Ry.* 472.

A certificate signed by an overseer de facto is sufficient.

A certificate, dated 7th September, 1758, and acted upon ever since, appeared to be in the names of two churchwardens and two overseers, but was executed only by one of the former and the two churchwardens; and it appeared also by the visitation books that the former, although nominated at Easter, was not sworn in until the 15th September following.

The Court held, that, after so great a lapse of time, and to avoid the conclusion of fraud, as well as upon grounds of public policy, they might presume the officer to have been sworn in at Easter, although not then recorded, and to have been again required to take the oath at the time stated in the book.

town, and there being no special custom warranting such appointment. (*Rex* v. *Inhabitants of St. Mary, Newmarket*, E. T. 1835, K. B., 4 N. & M. 693). And where, under a local act (Cheshire Constabulary Act, 10 Geo. 4, c. 97), the duration of the office of an assistant petty constable for certain districts was in the discretion of the justices who appointed the pauper, without specifying for what time he was appointed:—Held, that the office not being in its nature annual, no settlement was gained by serving it. (*Rex* v. *Inhabitants of Middlewich*, E. T. 1835, K. B., 4 N. & M. 682). So, an organist appointed during the pleasure of the vestry has not a public annual office, conferring a settlement under 3 Will. 3, c. 11, s. 6. (*Rex* v. *Inhabitants of St. George's, Hanover-square*, M. T. 1833, K. B., 2 N. & M. 505; S. C. 5 B. & Ad. 571). But the office of clerk and sexton of a chapel in an extra-parochial vill gives a settlement in the parish. (*Rex* v. *Inhabitants of Amlwch*, M. T. 1825, K. B., 4 B. & C. 757; S. C. 6 D. & R. 624). And where, in the year 1811, the office of parish clerk and sexton of B. becoming vacant, the rector sent for the pauper on a Sunday, and requested him to perform the duty of clerk for that day, the pauper did so, and the rector, on coming out of the desk, told the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in the marriages and funerals;" the pauper upon that, without anything further being said or done, entered upon the execution of the duties of the offices, and continued to perform them until 1833:—Held, a sufficient and valid appointment to the office, and that by such service the pauper gained a settlement in B. (*Rex* v. *Inhabitants of Bodding*, M. T. 1836, K. B., 1 N. & P. 166). So, the office of town-crier and bell-man is a public annual office within the 3 Will. & M., c. 11, s. 6, by the execution of which a settlement may be gained; and if the town comprises several parishes, the settlement will be gained in that parish in which such officer has last resided forty days. (*Rex* v. *Inhabitants of St. Peter's, Hereford*, E. T. 1830, K. B., 10 B. & C. 832).

REX *v.* INHABITANTS OF UPTON GRAY, E. T. 1830. K. B. 10 *B. & C.* 807.

A parish certificate, dated 1748, must be signed by all the churchwardens, to make it evidence.

A CERTIFICATE, nearly eight years old, appeared to have been signed, not by a majority of the parish officers for the time being, and the sessions held it to be void.

The Court would not support the certificate by presuming a supposed state of facts which were put in in support of the certificate, but the existence of which facts was highly improbable, and was repugnant to the other established facts in the case.

REX *v.* INHABITANTS OF AUSTREY, E. T. 1817. K. B. 6 *M. & Selw.* 319.

A seal must be affixed to each name.

A CERTIFICATE duly attested and allowed by justices, purported to be under the hands and seals of two churchwardens and one overseer, but one seal only was placed opposite the names of the two former, styled churchwardens.

The Court held this insufficient within the 8 & 9 Will. 3, c. 30, it being the execution of a power binding others than the parties to the instrument.

See Hawkins v. *Kemp*, 3 *East*, 440, *and Thaire* v. *Thaire*, *Palm.* 109, 112.

REX *v.* INHABITANTS OF SLAITHWAITE, M. T. 1833. K. B. 2 *N. & M.* 347.

A certificate, fifty-nine years old, is evidence.

A CERTIFICATE, fifty-nine years old, was produced in an imperfect state, and no allowance of justices appeared.

The Court held, that, as a question of fact, the sessions were warranted in deciding that the document was originally perfect.

REX *v.* INHABITANTS OF RUSTINGTON, E. T. 1817. K. B. 6 *M. & Selw.* 396.

The settlement remains in the certifying parish.

A PAUPER, whilst residing in N., under a certificate from R., was bound apprentice in N., but during the term slept occasionally in a third parish for more than forty nights in the whole, but slept the last night in N., where his master resided.

The Court held, that as, but for the certificate, he would have been settled in N., the certificate could not affect the right of such third parish, but that the settlement remained in the certifying parish.

REX *v.* EARL SHILTON, M. T. 1825. K. B. 6 *D. & R.* 184.

On a question of fact decided by the sessions the King's Bench will not interfere.

A CERTIFICATE purported on the face of it to be made by the major part of "the churchwarden and overseer," and being a printed form, the letter s had been struck out through the entire instrument, and evidence was offered by the appellants to show that only one overseer had ever been appointed, which was rebutted by two instances in which two appeared to have been appointed, but one only acted.

The Court, considering it as a question altogether of fact, and peculiarly for the sessions to decide, although they might have come to a different conclusion, confirmed the order, disapproving of the practice of sending up questions of fact for the opinion of the Court.

(*j*) As to lunatics.

Reg. *v.* Inhabitants of Darton, E. T. 1840. Q. B. 3 *P.* & *D.* 483.

The justices before making the order must inquire into and take evidence of the settlement.

A lunatic pauper, found in W., was removed to the county asylum, and two justices by an order reciting, that, upon inquiry, they adjudged the settlement to have been in D., and did thereby order the said parish to pay to the parish of W. a certain sum expended in the removal and care of the said pauper—

The Court held, that such order was bad for not shewing that the parties making the order had inquired into and taken the evidence as to the settlement.

II. RELATIVE TO THE REMOVAL OF*.

(*a*) In general.

Rex *v.* Inhabitants of Mile End Old Town, M. T. 1835. K. B. 5 *N.* & *M.* 581.

The 4 & 5 Will. 4 exclusively applies to English paupers.

The Court held, that the stat. 4 & 5 Will. 4, c. 76, s. 56, did not apply to relief given to children of Scotch or Irish parents, but the law with respect to them remains the same as it was before the passing of that act.

Rex *v.* Walthamstow, H. T. 1837. K. B. 1 *N.* & *P.* 460.

The 4 & 5 Will. 4 regulates the settlement of children by a former marriage†.

The 4 & 5 Will. 4, c. 76, s. 57, rendering the husband liable to maintain the children of the wife by a former marriage, and directing that they shall be deemed part of his family—

The Court held, not to change the settlement of such children, or give justices power to remove them to the husband's parish.

Reg. *v.* Inhabitants of Stafford, T. T. 1839. Q. B. 1 *P.* & *D.* 414; S. C. 10 *Ad.* & *E.* 417.

Under 4 & 5 Will. 4, if the stepfather absconds, the children are chargeable on the parish of their own father‡.

The children of a former marriage, not within the age of nurture, were left chargeable to the parish in which they were residing by the stepfather, who had absconded.

The Court held them to be removable to the place of settlement of their own father, notwithstanding the obligation of the stepfather to maintain them until the age of sixteen, under 4 & 5 Will. 4, c. 70, s. 57.

* See the 3 & 4 Will. 4, c. 40, continued by 7 Will. 4, c. 10.

† By 4 & 5 Will. 4, c. 76, s. 69, so much of any act or acts of Parliament as renders an unmarried woman with child liable as such to be removed, was from and after the 14th August, 1834, to be deemed repealed.

‡ Two justices removed S. S., wife of G. S., a prisoner in her Majesty's gaol in Bristol, and her five children, from the parish of Bedminster to the parish of Stogumber. The husband was in gaol for a term of 100 days, in execution for debt under the local court of requests act, which gaol was situate in the parish of B., where he had resided previously, and where he kept a house in which his wife and family lived at the time of the order of removal:—Held, that the order

REX *v.* INHABITANTS OF ST. PANCRAS, M. T. 1837. K. B. *7 Ad. & E.* 750.

THE Foundling Hospital not being extra-parochial, and the objects received there being with the approval of, and under certain regulations by, the directors, where a child had been left at the gate, though afterwards taken care of, on the refusal by the parish to take it into the poorhouse—

The Court held, that the child had not been so received by the Hospital as to relieve the parish from the burden of providing for it as casual poor.

The Foundling Hospital receiving a child left at the door does not relieve the parish.

(*b*) OF THE ORDER OF.

1. *Of the Justices.*

REX *v.* INHABITANTS OF GREAT YARMOUTH, E. T. 1827. K. B. 6 *B. & C.* 646.

AN order of removal was signed by two justices, one of whom, at the time, was churchwarden of the removing parish.

Per Bayley, J.—I think it is a fatal objection to this order, that the person who was the complainant should hear and adjudicate upon the complaint.

A justice cannot be the complainant and one of the justices hearing the complaint*.

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2. *To whom addressed.*

REX *v.* INHABITANTS OF CARTMEL, H. T. 1835. K. B. 4 *N. & M.* 357.

A PARISH was divided into seven townships, each respectively having overseers, and maintaining its own poor; but the parish at

Where a district has separ-

of removal was bad, as not shewing any circumstances which warranted the separation of the wife and her children from her husband. (*Reg.* v. *Inhabitants of Stogumber*, H. T. 1833, Q. B., 1 N. & P. 409). Before 4 & 5 Will. 4, if the husband, an Irishman, absconded, his wife and children might be removed to the wife's maiden settlement. (*Rex* v. *Inhabitants of Cottingham*, M. T. 1827, K. B., 7 B. & C. 615; S. C., 1 M. & Ry. 439). But where, upon an appeal against the order of removal of the wife, it appeared upon the respondents' evidence that the husband had a settlement in some parish in I. (there being several), but which was not known:—Held, that the removal to the wife's place of maiden settlement could not be supported. (*Rex* v. *Inhabitants of St. Mary, Beverley*, T. T. 1830, K. B., 1 B. & Ad. 201).

* On motion to quash an order of removal, the Court will not presume a fact not stated in the order, which would have the effect of vitiating the order, as that the husband, a Scotchman, lunatic, was residing in the removing parish; or that the parties removed, the wife and children, were not, at the time of the removal, residing therein, although not stated. (*Rex* v. *Inhabitants of Stockton*, M. T. 1833, K. B., 2 N. & M. 353). The chargeability of a pauper must appear upon the copy of the examination on which the order of removal was made, otherwise the respondents cannot be heard in support of the order. (*Black* v. *Inhabitants of Calkerton*, E. T. 1839, Q. B., 2 P. & D. 475). Where an order of removal had been made upon the examination (regular on the face of it) of T. B., which was transmitted according to stat. 4 & 5 Will. 4, c. 76, s. 79, and on appeal the appellants offered to prove that T. B., when examined, was a convicted felon:—Held, that such evidence was irrelevant, if offered as impeaching the examination. (*Rex* v. *Inhabitants of Alternun*, H. T. 1841, K. B., 10 Ad. & E. 699).

ate officers, the order of removal must be addressed to them.

large had no overseers, and made no rate for the maintenance of the poor. A portion of the parish in which the pauper gained a settlement was part of a marsh which had been derelict by the sea, and no evidence was given to shew of what particular township it formed a part, or whether it did form a part of any township.

The Court held, that the order upon the parish at large, which had no overseers, could not be supported.

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3. *Service of**.

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4. *Amendment of, and Effect of Fraud.*

REX *v.* AMLWCH, M. T. 1826. K. B. 4 *B. & C.* 757.

The sessions may amend an error in form †.

AN order of removal was directed to the churchwardens and overseers of the parish of L., which, in fact, was only a vill, and, upon an appeal, the objection of misdescription was taken.

The Court held, that an amendment in the direction of the order in that particular, by the sessions, was in a mere matter of form, which, under 5 Geo, 2, c. 119, s. 1, they had power to make.

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5. *Effect of, and who entitled to Custody of.*

REX *v.* INHABITANTS OF OLDBURY, M. T. 1835. K. B. 5 *N. & M.* 547.

An order unappealed against is conclusive ‡.

A PAUPER was removed by an order unappealed against from A. to a parish, B., in the county of S., consisting of two townships, C. and D., in the county of S., jointly maintaining their own poor; and of

* A suspended order should be served within a reasonable time, under the 49 Geo. 1, c. 124. (*Rex* v. *Lampeter*, M. T. 1824, K. B., 3 B. & C. 454; S. C. 5 D. & R. 310). Where an order was made on the 21st May, 1825, but suspended, and no notice served until the 12th August, 1826, and not executed until 24th January, 1831, when an order for executing it, and payment of 80*l.* maintenance, was made and served on 15th February following:—Held, that the original order was not void, but only voidable in consequence of the neglect in serving it; and that it was the duty of the appellant parish to have appealed against it at the next practicable sessions after notice of it served. (*Rex* v. *Pinkridge*, T. T. 1832, K. B., 3 B. & Ad. 538).

† The parish of B. consisted of several townships, one being called the township of B., but there were no separate overseers, and an orderof removal was addressed to the overseers of the township of B.:—Held, that the sessions might amend it, by directing it to the overseers of the parish of B. (*Rex* v. *Inhabitants of Bingley*, T. T. 1833, K. B., 2 N. & M. 103). But an order of removal cannot be amended in substance, as, by substituting the A. township for a parish. (*Rex* v. *Inhabitants of Bishop Wearmouth*, H. T. 1834, K. B., 3 N. & M. 77).

‡ If an unmarried pregnant woman be removed out of a parish, by or at the instance of its officers, to prevent her being there delivered, the child, when born, shall be deemed to have been born in that parish. But not if the fraudulent removal has been effected without the privity of the parish officers. (*Rex* v. *Mattersey*, M. T. 1832, K. B., 1 N. & M. 49; S. C. 4 B. & Ad. 211).

The parish on which the order of removal was made is entitled to the legal

a third township, in the county of W., maintaining its poor separately.

The Court held, that, there being no appeal, the order would be conclusive on that part of the parish of B., in the county of S.; and they having afterwards been directed by mandamus to maintain their poor separately, and the pauper having been subsequently removed to the township of C., that the latter township was not concluded by the former order.

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6. *Quashing.*

REX *v.* INHABITANTS OF WICK, ST. LAWRENCE, T. T. 1835. K. B. 2 *N.* & *M.* 289; S. C. 5 *B.* & *Ad.* 526.

Another order may be made after one has been quashed*.

A FORMER order of removal was quashed, on the ground of the pauper being at the time irremovable.

The Court held, that it was conclusive only with reference to the then state of things, and that, upon an appeal between the same parishes against a subsequent order of removal, the sessions properly received evidence of the grounds of the former decision.

Sewers.

See 3 & 4 *Will.* 4, *c.* 22.

I. RELATIVE TO THE COMMISSIONERS, p. 405.

II. RELATIVE TO THE RATES, p. 406.

III. RELATIVE TO THE NOTICE OF ACTION, p. 407.

IV. RELATIVE TO THE PLEADINGS, p. 407.

V. RELATIVE TO THE JURY, p. 408.

documents. (*Reg.* v. *Inhabitants of Outwell*, H. T. 1839, Q. B., 1 P. & D. 610; S. C. 9 A. & E. 836). The examination on which an order of removal was made stated that the father's pauper gained a settlement in M. by renting and occupying a house of one J. F. in M., of the yearly rent of 10*l.*; the grounds of appeal stated, that the order, examination, and notice of chargeability, were bad upon the facts thereof:—Held, that the appellants might shew, under their grounds of appeal, that the examination was defective, in not stating for how long, or when the renting was. (*Reg.* v. *Inhabitants of Middleton in Teesdale*, E. T. 1840, Q. B., 3 P. & D. 473; S. C. 10 A. & E. 688).

* Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant, on the trial of another appeal, may shew, by evidence, the distinct ground upon which the former order was quashed. (*Rex* v. *Inhabitants of Wheelock*, E. T. 1826, K. B., 5 B. & C. 511).

I. RELATIVE TO THE COMMISSIONERS.

GROCERS' COMPANY *v.* DONNE, T.T. 1836. C.P. 3 *Bing. N. S.* 34; S. C. 3 *Scott*, 356.

The commissioners are not liable unless clear neglect be shewn *.

IN case against commissioners of sewers for injury to the plaintiff's premises, by making a sewer by tunnelling, which it was found was proper to be made, and was skilfully and properly made; but that proceeding with the work by open cutting would have afforded a greater chance of escape from injury—

The Court held, that the Court could not balance possibilities; and that, to fix the commissioners, it should have been shewn that the injury would not have happened if the sewer had been constructed by the latter mode of working.

REX *v.* COMMISSIONERS OF SEWERS FOR PAGHAM, SUSSEX, T. T. 1828. K. B. 8 *B. & C.* 355.

Nor for erecting a groin which may have the effect of exposing adjoining lands to the inroads and force of the sea†.

COMMISSIONERS of sewers, acting bonâ fide for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels.

The Court held, that they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for that all owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of landowners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

II. RELATIVE TO THE RATE.

WINGATE *v.* WAITE, T. T. 1840. Ex. 6 *M. & W.* 739.

Commissioners can make no

A PARISH consisted of two districts, which had been assessed immemorially towards the repairs of a sea-wall protecting both

* Commissioners for the time being may sue upon a bond entered into by sureties for a collector, although the commissioners be not the actual obligees. (*Saunders* v. *Taylor*, H. T. 1829, K. B., 9 B. & C. 35). An amerciament on a township generally, and a distress on one of the parties liable, by commissioners of sewers, for neglect to repair, is good. Quære, whether such distress could be sold independently of 3 & 4 Will. 4, c. 22. (*Ramsey* v. *Nornabell*, H. T. 1840, K. B., 3 P. & D. 253). But the Court will not, upon an application to discharge an amerciament, enter into a disputed question as to the validity of the practice of the court of sewers. Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the Court discharged the fine, it being admitted, that it was not usual to re-swear the jury, except upon the issuing of a new commission. (*Ex parte Taylor*, H. T. 1829, Ex., 3 Y. & J. 91).

† But a mandamus will lie to commissioners to make a new sewer, or to alter an existing one, to prevent a nuisance. (*Rex* v. *Bristol Dock Company*, H. T. 1827, K. B., 6 B. & C. 181).

parts, under one assessment collected by one dyke-reeve, and the commissioners of sewers, without any presentment, appointed separate officers, and made a rate on one district exclusively for the repairs of the wall.

rate without a presentment*.

The Court held, that the jurisdiction of the commissioners to make a rate being founded on the presentment of a jury, without which the rate was utterly void, the warrant to levy was also void, and the commissioners liable in trespass.

SOADY *v.* WILSON, E. T. 1835. K. B. 4 *N. & M.* 777; S. C. 3 *Ad. & E.* 248.

A SPECIAL case found that the premises derived no immediate benefit from the works of the commissioners, "except the general benefit and advantage of being accessible, and of the approaching and neighbouring public ways being properly drained," &c.

Under 52 Geo. 3, c. 48, s. 7, parties actually rated to the poor are liable as occupiers to sewers rate, the extent of benefit derived is immaterial.

The Court held, that, upon the fact of there being some benefit, the commissioners had authority to levy the rate, and the Court could not interfere whether that was proper or not; and that, under the 52 Geo. 3, c. 48, s. 7, parties de facto rated to the poor-rates are to be deemed occupiers for the purposes of the statute.

III. RELATIVE TO NOTICE OF ACTION†.

IV. RELATIVE TO THE PLEADINGS.

MEDLEY *v.* PRITCHARD, T. T. 1839. C. P. 6 *Bing. N. S.* 442; S. C. 8 *Scott*, 684.

THE commissioners of sewers, in the course of their works, had obstructed a watercourse belonging to the plaintiff, who had commenced an action against the defendant, the contractor, in order to try the right to a larger compensation than that tendered by the commissioners, which, in 1835, was submitted to the award of a barrister, which ultimately became abortive; the commissioners al-

Commissioners of sewers cannot add a plea under a Sewers Statute, which would defeat

* Where there are separate divisions, separately drained, the rate should be made distinctly as to each division. (*Rex* v. *Commissioners of Sewers, Tower Hamlets*, E. T. 1829, K. B., 9 B. & C. 517). The commissioners have no jurisdiction to make a rate on a township. (*Emmerson* v. *Saltmarsh*, M. T. 1837, Q. B., 2 N. & P. 446).

† Where a scavenger, appointed by the commissioners of sewers for London, seized a cart and horse, (supposed to contain cinders), and assaulted and imprisoned the driver, (plaintiff), and beat the horse:—Held, that it was within the section of the local act, (57 Geo. 3, c. 19, s. 136), requiring twenty-one days' notice of action for any thing done in pursuance and by authority of that act. (*Breedon* v. *Murphy*, H. T. 1829, N. P., 3 C. & P. 574).

the plaintiff's action, after a great lapse of time.

leging a fraud to have been practised on them by the plaintiff's predecessor, thereupon, in 1839, moved to amend by adding a plea under the Statute of Sewers, and which would defeat the plaintiff's claim.

The Court, after such a lapse of time, considering it quite in their discretion, and to be granted only upon an equitable consideration of the whole case, refused to allow the amendment, unless the commissioners would consent to abide by the terms originally proposed by themselves.

V. RELATIVE TO THE JURY *.

Sheep Stealing†. See 7 & 8 *Geo.* 4, *c.* 29, *s.* 25, and, ante, tit. *Cattle.*

Sham Demurrer. See tit. *Demurrer.*

Sham Pleas. See tit. *Pleas.*

Shares. See tits. *Frauds, Statute of—Joint-Stock Company—Stock Jobbing.*

* A precept to the sheriff, under 23 Hen. 8, c. 5, s. 3, to summon a jury, must direct him to summon de corpore comitatus; a direction to summon from a particular district within the county is bad. (*Birkett* v. *Crozier*, M. T. 1827, N. P., 1 M. & M. 119).

† On the trial of an indictment for killing an ewe, with intent to steal the carcass, it appeared that the prisoner wounded the ewe by cutting its throat, and was then interrupted by the prosecutor, and the ewe died of the wound two days after. It was found by the jury who convicted the prisoner, that he intended to steal the carcass of the ewe. The fifteen Judges held the conviction right. (*Reg.* v. *Sutton*, 1838, N. P., 8 C. & P. 291). A. being tried for sheep stealing, it was proposed to call the wife of B. to prove that A. and B. had jointly stolen the sheep. B. having been convicted of it at the quarter sessions:—Held, that the wife of B. was a competent witness. (*Rex* v. *Williams*, 1838, N. P., 8 C. & P. 284).

Sheriff.

See tits. *Felo de se—Interpleader.*

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XIV. RELATIVE TO CRIMINALS, p. 430.

I. RELATIVE TO THE APPOINTMENT OF. See 3 & 4 *Will.* 4, *c.* 99.

II. RELATIVE TO THE RIGHTS OF.

(*a*) To fees and poundage*.

Rex *v.* Jones, M. T. 1830. Ex. 1 *C. & J.* 140.

The sheriff is not entitled to retain fees as additional expenses of an auction.

Upon a venditioni exponas issuing under an extent, the party delivering the writ deposited 5*l.* with the officer, and required him to sell by auction, which was alleged by the sheriff to have been given to cover the additional expense of an auction.

The Court held, that the officer could not retain beyond the legal fee on the warrant and poundage.

Davies *v.* Griffiths, M. T. 1838. Ex. 4 *M. & W.* 377; S. C. 7 *D. P. C.* 204.

The right to poundage is not affected by the 1 Vict. c. 55, or the table of fees made under it†.

On a rule calling upon the under-sheriff of M. to shew cause why he should not answer for his contempt in taking larger fees, as poundage, upon a sale by auction than are allowed by the Courts in the table of fees published under the authority of the act of 7 Will. 4 & 1 Vict. c. 55—

Per Cur.—The fees which a sheriff is entitled to take under the

* The 1 Vict. c. 55 regulates the fees payable to sheriffs upon the execution of civil process. By

Sect. 1. part of 42 Edw. 3, c. 9, the act 1 Hen. 5, c. 4, and part of 23 Hen. 6, c. 9, repealed.

Sect. 2. Sheriffs to take only such fees as are allowed by taxing officers of courts of law at Westminster.

Sect. 3. To prevent officers taking fees *not* allowed, or *greater* fees than *are* allowed, and other persons from taking any such fees.

Sect. 4. Court may award costs.

Sect. 5. Fees to the sheriffs of Lancashire and Durham.

Sect. 6. Act may be altered this session.

Before the 1 Vict. c. 55, the sheriff was not entitled to take from a party arrested a larger fee, for detaining him till bail given, than the 4*d.* allowed by stat. 23 Hen. 6, c. 10; and a sheriff's officer taking more was liable to the penalty under stat. 32 Geo. 2, c. 21, ss. 1, 12, though appointed by the plaintiff in the original cause a special bailiff for making the arrest. (*Plevin* v. *Prince*, T. T. 1839, Q. B., 10 Ad. & E. 494; S. P. *Innes* v. *Levi*, T. T. 1835, C. P., 4 D. P. C. 116; S. C. 2 Scott, 189). In a prior case it was held that the fees payable to the sheriff on an arrest were not within the 32 Geo. 2, c. 28, s. 12, the table of fees there mentioned being intended to regulate the fees of the gaoler and officers within the gaol; but sect. 1, prohibiting the sheriff from demanding or taking, on an arrest, more than is "allowed by law," was not to be confined to the specific mode of allowance in the 5th and 6th sections; the sum allowed by the Master in taxation, being virtually the allowance of the Court, is to be deemed an allowance by law. (*Marten* v. *Bell*, E. T. 1817, K. B., 6 M. & Selw. 220).

The prohibitions of 23 Hen. 6, against taking the prescribed fees, extend only to the party arrested. (*Foster* v. *Blakelock*, E. T. 1826, K. B., 5 B. & C. 328; S. C. 8 D. & R. 48).

Where an attorney employs a sheriff's officer to execute process, it must be presumed that it was on the terms of undertaking to pay what is usual. (*Foster* v. *Blakelock*, E. T. 1826, K. B., 5 B. & C. 328; S. C. 8 D. & R. 48).

† He is only entitled, when levying under an extent, to poundage on the sums actually received by the process; (*Rex* v. *Robinson*, M. T. 1835, Ex., 4 D. P. C. 447; S.C. 2 C., M. & R. 334); and under an attachment, he is not entitled to his poundage on the sum levied. (*Rex* v. *Sheriff of Devon*, M. T. 1834, B. C., 3 D. P. C. 10). So, on the execution of a ca. sa., the sheriff is not entitled to poundage; the 43 Geo. 3, c. 46, s. 5, only gives it under executions against the goods. (*Hayley* v. *Racket*, M. T. 1839, Ex., 5 M. & W. 620). And the sheriff has no right to poundage on a fi. fa. delivered to him where the amount of the execution is tendered to him before levy; and a sheriff having refused to take such

29 Eliz. c. 4, are not interfered with by the table of fees allowed under 7 Will. 4 & 1 Vict. c. 55.

(*b*) Against his plaintiff*.

(*c*) To sue on bond of indemnity †.

(*d*) To re-take in case of escape ‡.

III. RELATIVE TO THE DUTIES OF.

(*a*) As to the execution of process.

1. *In general.*

Brown *v.* Jarvis, M. T. 1835. Ex. 5 *D. P. C.* 281; S. C. 1 *Tyrw. & Gr.* 1033; S. C. 1 *M. & W.* 704.

It is the duty of the sheriff to arrest under the capias within a reasonable time§.

In an action against the sheriff for not arresting a defendant when he had an opportunity—

The Court held, that a sheriff is bound to arrest a party within a reasonable time after the delivery of the writ to him, and if he neglect so to do, he is liable for any damage which may result from his negligence; and, in order to maintain the action, it is not necessary to aver in the declaration that the writ has been returned.

Summers *v.* Moseley, E. T. 1833. Ex. 4 *Tyrw.* 159.

Allowing a prisoner to go to a

In an action against the sheriff for beginning to carry a party arrested to gaol within twenty-four hours, without his consent—

amount without poundage, and the defendant having paid poundage under protest, the Court determined on motion that the sheriff must pay it back again. (*Colls* v. *Coates*, E. T. 1840, Q. B., 3 P. & D. 511).

* Where the sheriff, upon the representation of the execution creditor, took the goods of a stranger in execution, and afterwards was sued by him, and paid damages:—Held, that he was entitled to recover them against the original plaintiff, and affirmed in Dom. Proc. (*Humphreys* v. *Pratt*, 1832, Dom. Proc. 2 Dow & Cl. 288).

† Where an indemnity bond had been fraudulently obtained by the sheriff's officer:—Held, that it formed a good plea to an action on the bond by the sheriff. (*Raphael* v. *Goodman*, T. T. 1838, K. B., 3 N. & P. 547).

‡ Where the second writ lodged against the party was, by mistake, omitted to be entered in the prison book, and the former writ having been withdrawn, the gaoler turned the prisoner out:—Held to be a voluntary escape, and that a subsequent re-taking by the sheriff was void, and the party entitled to be discharged; and the custody being illegal, the lapse of time was not a waiver of the objection, but without costs, unless an undertaking given to bring no action. (*Filewood* v. *Clement*, E. T. 1838, B. C., 6 D. P. C. 508).

§ Semble, if sheriff receives an irregular writ without objection the Court will not interfere to relieve him. (*Clarke* v. *Palmer*, H. T. 1829, K. B., 9 B. & C. 153). The 1 R. 2, c. 11, does not apply to the cases of cities or towns corporate, though counties within themselves. (*Rex* v. *Haythorne*, E. T. 1826, K. B., 5 B. & C. 429, n.).

Although a sheriff may seize a reasonable quantity, he cannot sell beyond what is sufficient to satisfy the execution, and is liable in trover for the excess. (*Batchelor* v. *Vyse*, T. T. 1834, C. P., 4 M. & Scott, 552).

The Court held, that his accompanying the officer to different inns and places, with the view of meeting parties who should become bail or settle the action, was not to be deemed "a carrying to a gaol or prison," within the meaning of 32 Geo. 2, c. 28, s. 1, in a suit for penalties.

variety of places to settle the action is not a carrying to gaol within the 32 Geo. 2*.

PUGH *v.* GRIFFITH, E. T. 1838. Q. B. 3 *N. & P.* 187.

THE sheriff having entered a house to execute a fi. fa. through an open communication with the adjoining house, and having seized the goods, found the outer door of the house where he had so seized them locked, and there was no one whom he could request to open the door.

The sheriff is justified in breaking open the door to get out of the house.

The Court held, that he was justifiable in breaking the lock for the purpose of letting himself out, and removing the goods.

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2. *Where several Writs of Execution*†.

3. *To discharge Defendant out of Custody after Payment*‡.

4. *To pay over or refund Money* §.

(*b*) AS TO THE RETURN OF, AND FALSE RETURN TO PROCESS.

1. *Rule for. Order on, and by whom obtained* ‖.

* While the officer was illegally carrying the party to gaol, within twenty-four hours after arrest, the prisoner, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged:—Held, that a consent so obtained was not free and voluntary within the statute, and that the plea was properly negatived by the jury. (*Barsham* v. *Bullock*, H. T. 1839, Q. B., 2 P. & D. 241). The defendant, who has been taken to prison within twenty-four hours by his own consent, cannot afterwards bring an action for breach of the statute. (*Silk* v. *Humphery*, T. T. 1836, K. B., 4 Ad. & E. 959).

† Where there is a prior execution, which is void, the sheriff is bound to execute a subsequent valid one. (*Lovick* v. *Crowder*, E. T. 1828, K. B., 8 B. & C. 132; S. C. 2 M. & R. 84).

‡ If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody. Semble, that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment. (*Rimmer* v. *Turner*, E. T. 1835, B. C., 3 D. P. C. 601). After tender of debt and costs, creditor is bound to discharge his debtor, and authorize sheriff to discharge him, and a refusal is primâ facie evidence of malice. (*Crozer* v. *Pilling*, E. T. 1825, K. B., 4 B. & C. 26). The sheriff or his officer is not bound to accept debt and costs, and payment to them is no discharge as against the plaintiff. (*Id.*)

§ Where the sheriff had levied damages in an undefended action for libel:—Held, that a resolution of the House of Commons, directing him to withhold the payment of the proceeds, and imprisonment for contempt, were no answer to the application for an attachment, and which was afterwards made absolute; the plaintiff having become insolvent, and his assignees claiming the money, it was their duty to apply to the Court. (*Rex* v. *Sheriff of Middlesex*, E. T. 1840, B. C,, 8 D. P. C. 522). The Court refused to compel a sheriff to refund to a defendant monies arising from an execution on his goods, on the ground that the action was defended by an attorney without authority, until it appeared whether such attorney was insolvent or not. (*Stanhope* v. *Eavery*, M. T. 1836, C. P., 5 D, P. C. 357).

‖ A Judge's order upon the sheriff to return process, returnable in vacation, having issued in vacation:—Held, that only one rule was necessary to make such

2. *Within what Time.*

REG. GEN., M. T. 1836. K. B., C. P., & Ex. 2 *M. & W.* 1; 1 *N. & P.* 1; 3 *Bing. N. S.* 386.

Rule in future is to be eight-day rule in all Courts, except London and Middlesex*.

IT is ordered, that sheriffs' rules (except for London and Middlesex) to return writs on mesne or final process, or to bring in the body, in future shall be eight instead of six-day rules.

order a rule of Court, and also for the attachment under Rule of Mich. Term, 3 Will. 4, No. 8. (*Kensit* v. *Bulteel*, H. T. 1833, Ex., 4 Tyrw. 59). The defendant, as well as the plaintiff, may rule the sheriff to return the writ. (*France* v. *Clarkson*, T. T. 1834, B. C., 2 D. P. C. 532). Where the plaintiff's attorney obtained from the sheriff's deputy, in London, a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office:—Held, that, under these circumstances, the sheriff could not be called on to return the writ. (*Hart* v. *Weatherley*, T. T. 1835, Ex., 4 D. P. C. 171). Where a defendant, against whom a fi. fa. had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods:—Held, that the sheriff could not be ruled to return the writ on behalf of the bankrupt. (*Gilbert* v. *Whalley*, M. T. 1835, Ex., 2 C., M. & R. 722; S. C. 1 Tyrw. & G. 189). So, where the plaintiff, after the arrest by the officer of a liberty, had become the assignee upon the discharge of the defendant under the Insolvent Act:—Held, that he was not afterwards entitled to call for a return of the writ. (*Hepworth* v. *Sanderson*, E. T. 1831, C. P., 8 Bing. 19; S. C. 6 M. & P. 64).

Semble, that the sheriff is bound to return a bailable writ of capias immediately, or within a reasonable time after he has executed it, without being ruled to do so, although he would not be in contempt till after he has been so ruled; therefore, where, on an issue, whether the sheriff had returned the writ "according to the exigency thereof," it appeared that the party was arrested in August, and the sheriff did not make any return of the writ till October, (he being then ruled to do so), the Judge directed the jury to find, that the sheriff had not returned the writ "according to the exigency thereof." (*Woodman* v. *Gist*, M. T. 1837, N. P., 8 C. & P. 213). And where a sheriff does not return in due time a writ of inquiry, the Court will compel him by rule so to do. (*Stockdale* v. *Hansard*, H. T. 1840, Q. B., 8 D. P. C. 297).

A writ of capias, and a rule to return it, were delivered to the sheriff at the same time. The sheriff, two days afterwards, returned non est inventus. The Court refused to interfere. (*Evens* v. *James*, T. T. 1838, C. P., 6 Scott, 354).

The sheriff is bound to pay the necessary fee for opening the Treasury during vacation, in order to file his return, if an order to make the return under sect. 15 of the Uniformity of Process Act has been made. (*Rex* v. *Sheriff of Surrey*, M. T. 1834, B. C., 3 D. P. C. 82).

Semble, that where one sheriff has made a special return to a writ of capias, the Court will not compel his successor to make another, the circumstances remaining unaltered. (*Pasmore* v. *Wilkinson*, E. T. 1835, C. P., 3 D. P. C. 635). But a sheriff, under special circumstances, may be compelled to return a writ of fi. fa., although he has been three years out of office, and has, by leave of the Court, withdrawn from possession of the property seized. (*Wilton* v. *Chambers*, H. T. 1835, B. C., 3 D. P. C. 333). The sheriff of the county palatine of Lancaster, when called upon to return final process in causes in the superior Courts of Westminster, has the option of returning it either to the Court which has the cause, or to the Chancellor of the county palatine. (*Rex* v. *Sheriff of Lancashire*, T. T. 1839, B. C., 7 D. P. C. 765).

* By Reg. Gen., H. T. 2 Will. 4, "When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon as the office shall be open."

By Reg. Gen., H. T. 3 Will. 4, it is ordered, "That, in case a rule of Court or Judge's order for returning a bailable writ of capias shall expire in vacation, and the sheriff, or other officer having the return of such writ, shall return cepi corpus thereon, a Judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such

3. *Form of.*

IZOD *v.* LAMB, E. T. 1830. Ex. 1 *C. & J.* 35.

Return of nulla bona valid when goods are under a demise*.

IN an action against the sheriff for a false return of nulla bona, it appeared that, previous to the marriage of the party, by an agreement, reciting that certain furniture, &c., were the goods of the wife, it was agreed that she was to have it if she survived, but if he survived, she was to be entitled to dispose of it by will, and he then covenanted that he would not sell or dispose of it, and that, if she survived, he would, by his will or otherwise, convey or insure to her all the real and personal estate he should die possessed of; but the whole provisions of the agreement purported to leave him in possession of his marital rights, and that her interests upon the events happening were to be enforced by means of his covenant.

The Court held, that, under such circumstances, the return of nulla bona was improper; but it appearing that the wife, being in the separate possession of such goods, had demised them with certain premises for a term, as she was to be taken to be the agent of her husband, the sheriff could not, during the continuance of such demise, seize the goods, and therefore, in that respect, the return of nulla bona was warranted by law.

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4. *Of enlarging Time*†.

order, as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and if the sheriff, or other officer, shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the mean time."

Where a sheriff has applied to the Court under the Interpleader Act, and his rule is discharged, he is entitled to a reasonable time for the return of the writ after the disposal of the rule before an attachment can issue against him. (*Rex* v. *Sheriff of Hertfordshire*, T. T. 1836, B. C., 5 D. P. C. 144).

* So, the sheriff having entered under a writ of fi. fa., the officers of the customs, before sale by him, seized the goods in his possession under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws. The sheriff thereupon returned nulla bona to the writ of fi. fa.:—Held, that he was justified in making such return. (*Grove* v. *Aldridge*, M. T. 1832, C. P., 9 Bing. 428; S. C. 1 M. & Scott, 568). But if a sheriff returns to a writ of fi. fa. a seizure under that and another writ, it is bad. Therefore, if two writs issue, and the goods remain in the sheriff's hands for want of buyers, he must make some return as to the value of the goods, although he will not be bound by the amount stated. (*Wintle* v. *Lord Chetwynd*, H. T. 1839, B. C., 7 D. P. C. 554). And a return to a writ of capias, "The defendant is not to be found in my bailiwick," is a void return. (*Rex* v. *Sheriff of Kent*, H. T. 1837, Ex., 2 M. & W. 316; S. C. 5 D. P. C. 451).

† The Court will grant time to enable a sheriff to make his return where defendant is dangerously ill. (*Baker* v. *Davenport*, T. T. 1827, K. B., 8 D. & R. 606). The Court will not enlarge time for returning writ where sheriff by his own neglect has placed the security in jeopardy. (*Colley* v. *Hardy*, M. T. 1829, K. B., 5 M. & R. 123).

5. *Validity of, how tried.*

GOUBOT *v.* DE CROUY, T. T. 1833. Ex. 1 *C. & M.* 772; S. C. 2 *D. P. C.* 86; S. C. 3 *Tyrw.* 906.

The Court will not try the validity of the return on affidavit.

ON motion to set aside the sheriff's return to a capias, on the ground that the defendant was a domestic servant of an ambassador, the affidavit stated that he was a trader, and not the servant of an ambassador, and strong circumstances of collusion between the sheriff's officer and the defendant.

Per Cur.—As the return is good on the face of it, we cannot set it aside. The remedy is by action. The truth of the return cannot be investigated on an affidavit.—Rule refused.

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6. *Excuse for returning*.*

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7. *Amendment of the Return.*

MOORE *v.* THOMAS, M. T. 1833. C. P. 3 *M. & Scott*, 810.

If the day of execution be not indorsed, the sheriff must amend his return.

THE sheriff had omitted to indorse on the capias the day of its execution.

The Court held, that the course was to call on him to shew cause why he should not amend his return, and make such compensation as the Court should direct, and pay costs of the application; and not to move for an attachment.

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8. *Effect of.*

FIELD *v.* SMITH, T. T. 1837. Ex. 2 *M. & W.* 388; 5 *D. P. C.* 735.

The sheriff's return is binding upon him, and cannot be affected by change of circumstances†.

THE sheriff levied and sold under a fi. fa., and, after notice of the defendant having petitioned for his discharge under the Insolvent Act, returned fieri feci—

The Court held, that he was bound by such return, notwithstanding the defendant's subsequent discharge.

* Where a writ of ca. sa. has been sued out, and the parties subsequently compromise, the Court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. (*Hedges* v. *Jordon*, E. T. 1836, B. C., 5 D. P. C. 6). It is questionable, whether an order to stay proceedings on terms not fulfilled discharges the sheriff from the duty of obeying a rule to bring in the body, obtained, but not returnable, before the order to stay. (*Rex* v. *Sheriff of Middlesex*, M. T. 1824, C. P., 2 Bing. 366).

† In an action for an escape the sheriff is bound by the statement in his return, not only as to the fact of the arrest, but also as to the day on which it was made. (*Cook* v. *Round*, M. T. 1835, N. P., 1 M. & Rob. 512). In case against the sheriff for not selling the residue of goods, which he returned that he had seized but not sold after a vend. expon., it appeared that the original debtor before judgment became bankrupt, and that the plaintiff had notice of his insolvency at the time of issuing the execution:—Held, that the sheriff was not bound by the return, as he would still have been liable to the assignees. (*Bridges* v. *Wolford*, E. T. 1817, K. B., 6 M. & S. 42).

9. *As to Death pending*.*

10. *As to a false Return. Of the Pleadings,* see post, Div. XIII.

WARMOLL *v.* YOUNG, T. T. 1826. K. B. 5 *B. & C.* 660; S. C. 8 *D. & R.* 442.

Sheriff liable where he lends himself to the views of a particular execution creditor.

IN an action against the sheriff for a false return—

The Court held, that, if a sheriff act fairly and impartially between two contending judgment creditors, he will not be compelled to support the case of either; but, if he shew any favour or partiality, or give any aid to one and withhold it from the other, he will be bound by the rights or disabilities of the party whom he aids, and must stand or fall with him.

IV. RELATIVE TO THE LIABILITY OF.

(*a*) SUMMARY JURISDICTION OF THE COURTS OVER.

CLARKE *v.* PALMER, H. T. 1829. K. B. 9 *B. & C.* 153.

The Court will not compel the sheriff to execute process which is irregular.

THE attorney of the execution creditor, at the time of lodging a ca. sa. with the sheriff, desired to have the warrant addressed to a particular officer, stating, that he knew neither the defendant's address nor place of residence, but that he would endeavour to learn and inform the officer, and the defendant was subsequently arrested by another officer in another part of the county, and discharged upon payment of the debt and costs.

The Court, not merely on the ground of the rule of Court re-

* On an application to set aside an attachment issued against the sheriff for not returning a writ of fi. fa., it appeared that the writ was issued on the 2nd of August, and that a levy of part of the amount of the defendant's debt was made on the following day. On the 4th of September the sheriff was ruled to return the writ in eight days, but on the 12th of the same month the defendant died. The writ was not returned until the 1st of November:—Held, that the plaintiff had lost nothing by the delay on the part of the sheriff, and that the attachment might be set aside on payment of costs. (*Reg.* v. *Sheriff of Essex*, M. T. 1839, C. P., 6 Bing. N. S. 150; S. C. 8 D. P. C. 5).

† Where, after a return to a writ of fi. fa., that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, if the creditor accepts that part on account, he does not thereby waive his right of action for a false return. (*Holmes* v. *Clifton*, T. T. 1840, Q. B., 4 P. & D. 112; questioning *Beynon* v. *Garrat*, 1 C. & P. 154). And the right of action for a false return to a fi. fa. held not waived by the acceptance of the sum levied on account and in part satisfaction of the sum indorsed. (*Holmes* v. *Clifton*, E. T. 1839, Q. B., 2 P. & D. 556).

In an action against a sheriff for a false return, and for an excessive levy, and for not paying over the residue, the Court refused to allow the sheriff to pay money into Court, with costs, though it appeared that the sheriff had by mistake retained money to pay hop duty to the Crown, but which was subsequently discovered to have been paid, and had also made charges for possession and other charges usually made but in strictness not allowable. (*Woodgate* v. *Baldock*, M. T. 1833, Ex., 2 D. P. C. 256).

‡ But the Court will grant a rule for the sheriff to pay over money paid by a defendant under a ca. sa. wrongfully sued out against him. (*Morgan* v. *Short*,

quiring the place of abode and addition of the party to be indorsed on the writ not having been complied with, but that the sheriff, under the circumstances of the conduct of the party, might be exposed to an action of an escape, set aside the ca. sa. for irregularity. Semble, if the sheriff receive such irregular process without objecting the Court will not interfere.

(*b*) For acts of his officers, and misconduct in conducting executions.

Crowder *v.* Long, M. T. 1828. K. B. 8 *B. & C.* 598.

The sheriff is not liable for the misconduct of his officers to which he is not privy*.

In an action for money had and received, it appeared that a fieri facias issued against the goods of A. The goods were seized by the bailiff. The execution creditor authorized the bailiff to quit possession; the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given.

M. T. 1826, C. P., 4 Bing. 147). Where two fi. fas. issued, and a third party claimed the goods, which were sufficient to satisfy both debts, and alleged that they had been improvidently sold after notice, a rule was granted that the plaintiffs might defend the action against the sheriff or abandon their claims; if they declined defending within one week, that the sheriff might on the trial appear and protect his interests, he undertaking to pay the amounts under the writs of execution if the claimant should fail. (*Slowman* v. *Back*, H. T. 1832, K. B., 3 B. & Ad. 103).

* And the sheriff is not liable for acts of officer done wholly beyond his authority, and to which sheriff was no party. (*Cook* v. *Palmer*, E. T. 1827, K. B., 6 B. & C. 739). But the sheriff is liable for money received by his officers in the course of managing the business of the execution debtor. (*Underhill* v. *Wilson*, T. T. 1830, C. P., 6 Bing. 697). And the sheriff may be liable for the acts of the officer's son or assistants. (*Price* v. *Peck*, E. T. 1835, C. P., 1 Scott, 205).

In an action for a false return of nulla bona, it appeared that prior writs having issued at the suit of S. and E. against a mining company, under which property was taken and sold by the then sheriff, but pending a reference in Chancery to the Master as to the validity of the claims, who reported, that a sum less than the amount levied was due to S. and nothing due to E.; and it was ordered that the balance, after payment of the sum found to be due to E., should be paid over to the company; the plaintiff having issued an execution against the company in the same year, and after the then sheriff had gone out, issued an alias fi. fa., directed to the present sheriff:—Held, that the balance remaining in the hands of the bankers of the under-sheriff, who had continued all along in office, could not be considered as money in the hands of the present sheriff, and rendering him liable for money never transferred to his account, nor could he seize and apply in satisfaction of the plaintiff's execution money which still remained in the under-sheriff's hands, having been paid into his bankers to his account. (*Harrison* v. *Paynter*, E. T. 1840, Ex., 8 D. P. C. 349),

Where the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the Court ordered the former to be barred as against the claimant, and the property to be restored to the latter, and permitted him to sue the sheriff in an issue to try whether any damage had been caused by his misconduct subsequent to the seizure, the execution creditor remaining liable for the seizure. (*Lewis* v. *Jones*, M. T. 1836, Ex., 2 M. & W. 203). After seizure by the sheriff the execution was set aside by rule of Court on terms of bringing no action for the seizure, the defendant gave notice to the sheriff, but the latter, receiving no notice from the plaintiff, proceeded to sale:—Held, that the defendant was not precluded from bringing an action of trespass for such sale. (*Perkins* v. *Plympton*, E. T. 1831, C. P., 7 Bing. 676).

Before the sale another fieri facias issued at the suit of a second creditor; to that writ the sheriff returned nulla bona. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff having previously paid the value of such goods to the creditor under the first fi. fa., brought an action to recover from him that money.

The Court held that he was entitled to recover the same, unless it were shewn by the defendant, that, at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer, and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with knowledge of the misconduct of his officer.

(*c*) For extortion. See 1 *Vict. c.* 55, p. 411.

Buckle *v.* Bewes, H. T. 1825. K. B. 3 *B. & C.* 688; S. C. 5 *D. & R.* 495.

A retention of money beyond the legal fees is an offence within 29 Eliz.*.

A sheriff had levied an execution, and there was not sufficient to satisfy the sum indorsed on the writ.

The Court held, that he could not retain any thing for keeping possession, but must take only the fees allowed by 29 Eliz. c. 4, although the possession may have been lengthened by an injunction out of Chancery.

(*d*) For levying after recognizance satisfied.

Harper *v.* Hayton, M. T. 1829. K. B. 5 *M. & Ry.* 305.

A sheriff who levies under a recognizance after defendant is discharged is liable to an action.

The sheriff levied part of the penalty on a recognizance forfeited at a quarter sessions, and had the defendant in execution for the residue, and before the money levied had been paid over by him he received notice of the sessions having discharged the defendant therefrom, which they had jurisdiction to do.

The Court held, that he was liable to an action for the amount in his hands, as money had and received.

(*e*) For seizing wife's goods†.

V. RELATIVE TO HIS OFFICERS, AND OF SPECIAL BAILIFFS‡.

* In an action on 29 Eliz. c. 4, for extortion, giving treble damages, the plaintiff is entitled to three times the amount given by the jury. (*Buckle* v. *Bewes*, E. T. 1825, K. B., 4 B. & C. 154).

† Where a man and woman had been married, and goods, which had been the property of the woman before marriage, were seized, and sold under an execution against the goods of the man; and the woman, two years afterwards, discovered that the man had a wife living at the time he professed to marry her:—Held, that she was entitled to maintain trover against the sheriff for the value of those goods, though no blame was attributable to the sheriff or his officers. (*Glasspoole* v. *Young*, T. T. 1829, K. B., 9 B. & C. 696).

‡ Where the sheriff, on a ca. sa. issued, directed his warrant to the bailiff of a liberty within the county, his deputies, and to J. B., his bailiff, pursuing the

VI. RELATIVE TO ELISORS*.

VII. RELATIVE TO THE EXECUTION OF PROCESS IN LIBERTIES†.

VIII. RELATIVE TO SALES BY.

SCARFE *v.* HALIFAX, M. T. 1840. Ex. *7 M. & W.* 288.

Under an alleged sale the question for the jury is to whom the goods belong‡.

A PARTY having obtained a judgment of nonsuit for 67*l.* 11*s.* 6*d.*, issued a writ of fi. fa. thereon to the defendant, the sheriff of S. The sheriff having seized goods in the plaintiff's house, refused to give them up until the sum of 30*l.* 1*s.* 6*d.*, for poundage and expenses, together with the above sum of 67*l.* 11*s.* 6*d.*, were paid.

terms of a common warrant:—Held, that, although informal as directed to the bailiff's deputies, it was nevertheless deemed a warrant, and not a mandate. (*Jackson* v. *Hill*, E. T. 1839, Q. B., 2 P. & D. 455).

A mere request that a particular person named should be employed, (*Corbet* v. *Brown*, T. T. 1838, B. C., 6 D. P. C. 794), or the mere fact of a plaintiff requesting the sheriff to direct his warrant to a particular officer, does not constitute the latter a special bailiff so as to render him the plaintiff's agent. (*Balson* v. *Meggat*, H. T. 1836, B. C., 4 D. P. C. 557). But where a plaintiff sent a writ of capias to the under-sheriff, inclosed in a letter, wherein he requested that warrants might be granted to particular officers, whom he named, and to one of whom he said he would write in a day or two. One of the officers afterwards arrested the defendant on a writ, at the suit of another party, and let him go at large on his finding bail to that action:—Held, that, under these circumstances, the plaintiff had made the officers his special bailiffs, and that the sheriff was not answerable for the neglect of the officers to detain the party on the plaintiff's writ. (*Ford* v. *Leche*, E. T. 1837, K. B., 1 N. & P. 737). In an action for an escape, it was proved that the agent requested that the warrant for the arrest of the prisoner might be directed to a particular officer; that he gave instructions to that officer, and afterwards took him and his assistant to the place where the caption was to be made, and then required him to execute the warrant in a certain manner:—Held, that a nonsuit, on the ground of the bailiff being the special bailiff of the plaintiff, was rightly entered. (*Doe* v. *Trye*, T. T. 1839, C. P., 5 Bing. N. S. 573; S. C. 7 Scott, 704; S. C. 7 D. P. C. 636).

The sureties are only responsible for the due performance of the officer's duty to the sheriff, and not for acts committed by him collateral to his ordinary official duties. (*Cook* v. *Palmer*, E. T. 1827, K. B., 6 B. & C. 739).

* Where the sheriff and coroners were members of a corporation, which were plaintiffs in the action, the Court allowed a rule absolute in the first instance to the officer of the Court to appoint elisors. (*Mayor of Norwich* v. *Gill*, H. T. 1832, C. P., 8 Bing. 27; S. C. 6 M. & P. 91).

† Where the writ, directed to the sheriff, contained no non omittas clause, and was issued by him to the bailiff of a liberty, and, after both officers obtaining time to return it, they returned cepi corpus:—Held, that the bailiff by applying for time was not precluded from having the rule, for not returning the mandate, discharged, the plaintiff having obtained all that he had to require. (*Jackson* v. *Taylor*, T. T. 1836, B. C., 5 D. P. C. 140; Id. 212). A sheriff's bailiff, who was also a bailiff to the lord of a liberty, with the franchise of retorna brevium, having levied upon goods within the liberty, under a warrant from the sheriff in the usual form, applied to the steward of the lord, upon receiving a notice of a fiat of bankruptcy against the sheriff, and under his directions paid over the money to the plaintiff, on receiving an indemnity for the lord:—Held, that the lord had thereby recognised and adopted the act of the bailiff, and waived any objection to the legality of the warrant, and that a rule for discharging a rule calling upon the lord to return the sheriff's mandate should be discharged. (*Platel* v. *Douse*, H. T. 1838, C. P., 4 Bing. N. S. 204).

‡ If the plaintiff has bought sails of the sheriff under an execution, with a knowledge that they are deposited at a sail-maker's, and does not apply for a de-

The plaintiff, before the execution, had, by an assignment alleged by the defendant to be fraudulent, conveyed his property to H. and J., who sent an agent to demand the goods, who, on the sheriff's refusing to deliver them except on payment of the sum of 97*l.* 13*s.*, paid it under a protest, and obtained a receipt as for a payment by H. The sheriff returned that he had levied of the goods of the plaintiff the sum of 67*l.* 11*s.* 6*d.* The defendant tendered in evidence a letter, written by the under-sheriff to the sheriff's officer, directing him to receive the sum of 67*l.* 11*s.* 6*d.*, if the plaintiff tendered that amount.

The Court held, that it ought to have been left to the jury to say whether the goods seized by the sheriff, or the money paid to him, belonged to the plaintiff; and that the sheriff was not estopped by his return from saying that the goods seized beyond the amount of the execution did not belong to the plaintiff.

IX. RELATIVE TO RENT UNDER EXECUTIONS*.

livery till after the time when the sheriff is bound to pay over the money, he can maintain no action against the sheriff if the sail-maker refuses to deliver them up. (*Duncan* v. *Garratt*, H. T. 1824, N. P., 1 C. & P. 169). To support an action for selling goods let to hire for a term, the reversioner should give notice to the sheriff of the party having only a qualified interest. (*Dean* v. *Whittaker*, T. T. 1824, N. P., 1 C. & P. 347). In an action by a landlord against the sheriff, the Court refused to allow the proceeds of the sale to be paid into Court with the costs of the action, though it was sworn that the sale was regularly conducted. (*Groombridge* v. *Fletcher*, H. T. 1834, Ex., 2 D. P. C. 353). The Court will not restrain him from selling, merely by an offer of a party claiming the goods to indemnify him. (*Harrison* v. *Foster*, H. T. 1836, B. C., 4 D. P. C. 558). The sheriff may be entitled to expenses of sale against assignees. (*Clarke* v. *Nicholson*, H. T. 1835, Ex., 1 C., M. & R. 724; S. C. 3 D. P. C. 454; S. C. 5 Tyrw. 233; S. C. 6 C. & P. 712). The stat. 2 & 3 Vict. c. 29 has a retrospective operation, so as to protect the sheriff from liability in respect of a bonâ fide execution levied on the goods of a bankrupt without notice of the act of bankruptcy when the seizure and sale took place, and the fiat issued before the passing of the act, but the assignees were not appointed until afterwards. (*Nelstrop* v. *Scarisbrick*, T. T. 1840, Ex., 8 D. P. C. 747; S. C. 6 M. & W. 684). Where the amount seized is the subject of dispute, the Court will not permit the sheriff to pay it into Court till indemnified. (*Hartley* v. *Stead*, M. T. 1833, C. P., 8 Moo. 466).

* The stat. 8 Ann. c. 14, is confined to executions on judgments, (*Brandling* v. *Barrington*, E. T. 1827, K. B., 6 B. & C. 467), but applies to goods in apartments being parcel of a messuage. (*Thurgood* v. *Richardson*, H. T. 1831, N. P., 4 C. & P. 481). If the attorney for an execution creditor on being informed of a claim by the landlord for rent direct the sheriff's officer to withdraw the execution, and he do so, and the plaintiff sue out a ca. sa. for the debt, such execution creditor cannot bring an action against the sheriff for falsely returning to the fi. fa. that so much rent was due; and he will not be entitled to recover though he shew that the supposed landlord had not a right to the rent claimed, and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was. (*Stuart* v. *Whittaker*, M. T. 1825, N. P., 1 R. & M. 310; S. C. 2 C. & P. 100). But, if the sheriff, contrary to the 8 Ann. c. 14, s. 1, remove the goods and sell them without paying (up to a year, if due) to the landlord, and the goods sell for less than the rent, the sheriff cannot compel the landlord to accept the sum which they produced on the sale, the landlord is entitled to such damages as the jury may think he has sustained by the removal. (*Calvert* v. *Jolliffe*, E. T. 1831, K. B., 2 B. & Ad. 418). Where the sheriff executes a fi. fa., and he receives notice of a year's rent being due, and the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; and, if he sells, the Court will not stay proceedings in an

X. RELATIVE TO ABANDONMENT OF SEIZURE BY*.

XI. RELATIVE TO THE SHERIFF'S COURTS†. See also tits. *Interpleader—New Trial—Trial, Writ of.*

XII. RELATIVE TO THE OLD AND NEW SHERIFF‡.

XIII. RELATIVE TO REMEDIES AGAINST.

(*a*) By action.

1. *Form of.*

CARLISLE *v.* GARLAND, H. T. 1831. C. P. 7 *Bing.* 298; S. C. 5 *M. & P.* 102.

Formerly, trover lay where

THE sheriff, being in possession of goods of one L. under a writ of fi. fa issued at the suit of one P., assented to an arrangement,

action against him on the 8 Ann. c. 14, s. 1, on paying over the proceeds of the sale. (*Foster* v. *Hilton*, E. T. 1831, B. C., 1 D. P. C. 35).

Case against a sheriff. The first count was framed upon 8 Ann. c. 14, s. 1, for seizing the goods of a tenant in execution without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice, and stated that the defendant took the goods of T., the tenant of the plaintiff, under a fi. fa. issued against S. at the suit of B. This was not traversed by the pleas, and no other execution appeared:—Held, that the connexion of the party, who was shewn to have seized the goods with the defendant, sufficiently appeared, without producing any acknowledgment from the defendant to that party. (*Reid* v. *Poyntz*, E. T. 1840, Ex., 8 D. P. C. 410; S. C. 6 M. & W. 410).

* The property in goods taken in execution is not changed by the delivery of the writ to the sheriff until sale by him, but remains still in the debtor, and may be dealt with by him, subject to the claims upon it and to the execution: where, by taking security for the debt of a third person, and other circumstances, there was evidence for the jury to presume an abandonment by the creditor of his writ of execution, and the debtor bonâ fide transferred the property to the plaintiff:—Held, that he might maintain trespass against the execution creditor for the seizure and subsequent sale of the goods. (*Samuel* v. *Duke*, E. T. 1838, Ex., 3 M. & W. 622).

† The sheriff is not liable in trespass for the act of the bailiff of a county court in taking the goods of a stranger, upon process directing him to take the defendant's goods. (*Tunno* v. *Morris*, T. T. 1835, Ex., 2 C., M. & R. 298; S. C. 4 D. P. C. 224).

‡ The new sheriff is not amenable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by the indenture. (*Davidson* v. *Seymour*, H. T. 1827, N. P., 1 M. & M. 34). And writs wholly executed ought not to be transferred to the new sheriff, under 3 & 4 Will. 4, c. 99, s. 7; and held, that the balance of the proceeds constitute a debt from the former sheriff to the debtor, and could not be taken in execution under 1 & 2 Vict. c. 110, s. 12; and that the defendant was not rendered liable by having employed the same under-sheriff. (*Harrison* v. *Paynter*, E. T. 1840, Ex., 8 D. P. C. 349). Where the old sheriff, not having sold goods seized, is distrained, and a motion made to increase issues, the Court will allow it to be for the whole amount, and further to cover the costs of delay of the application; and it is absolute in the first instance. (*Nowell* v. *Underwood*, M. T. 1836, K. B., 5 D. P. C. 229). In an action against the late sheriff, the Court, upon an affidavit of his being abroad, and the period of his return doubtful, allowed service of process upon his late under-sheriff to be good service upon him. (*Batchelor* v. *Vyse*, 2 M. & Scott, 171).

whereby the goods were delivered over to P. in satisfaction of his debt, a portion of them being handed over to the officer to secure his poundage. Before the issuing of the fi. fa. L. had committed an act of bankruptcy, whereupon a commission was sued out after the delivery of the goods by the sheriff's officer.

seizure and sale after act of bankruptcy*.

The Court held, that such delivery amounted to a conversion, for which the sheriff was liable in trover at the suit of the assignees of L.

SMITH *v.* EGGINGTON, M. T. 1837. Q. B. 6 *D. P. C.* 38; S. C. 2 *N. & P.* 143.

IN trespass against the sheriff for false imprisonment; plea, justifying under an attachment out of Chancery; and the replication only stated the detainer by the defendant after thirty days, contrary to the 11 Geo. 4 & 1 Will. 4, c. 36, s. 15. On demurrer—

But trespass does not lie against the sheriff for imprisonment under an attachment†.

The Court held, that the replication was bad, the sheriff not being a trespasser ab initio, the action of trespass was not maintainable.

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2. *Declaration.*

LLOYD *v.* WOOD, T. T. 1836. K. B. 5 *Ad. & E.* 228.

IN case against the sheriff for executing an attachment against a party in contempt for not obeying an order of the Court of Chancery, by attaching the body, he "being then privileged from being so attached, and the defendant well knowing," &c.:—Held, that the declaration was bad for not shewing the nature of the privilege, and that it was such as to prevent the ordinary duty of the sheriff.

In declaring against a sheriff for breach of duty, the act complained of must clearly be one falling within the scope of his duties‡.

* Though without notice. (*Dillon* v. *Langley*, E. T. 1831, K. B., 2 B. & Ad. 131). But now see 2 & 3 Vict., c. 29, ante, tits. *Bankrupt—Execution.* Where, in trover by the owner for goods let on hire and seized by the sheriff, the declaration alleging the carrying and converting, &c., but it appeared that the sheriff had not sold, the learned Judge directed a nonsuit. (*Duffill* v. *Spottiswoode*, E. T. 1828, N. P., 3 C. & P. 437).

† Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff under a writ of levari facias issued in a suit in the county court, because the sheriff is, in such a case, a judicial and not a ministerial officer. (*Tinsley* v. *Nassau*, T. T. 1827, N. P., 1 M. & M. 52; S. C. 2 C. & P. 582). But the sheriff is liable in trespass if the officer, under colour of a fi. fa., takes the defendant to prison. (*Smart* v. *Hutton*, M. T. 1833, K. B., 2 N. & M. 426).

‡ A declaration, in the commencement, stated that the defendant was summoned to answer the plaintiff, assignee of certain sheriffs, but the bond declared on appeared to be made to the plaintiff personally:—Held sufficient on special demurrer. (*Reynolds* v. *Welsh*, H. T. 1835, Ex., 3 D. P. C. 441). And declaration for an escape on mesne process need not allege, that an affidavit of the cause of action was made and filed; (*Nightingale* v. *Wilcoxson*, M. T. 1829, K. B., 10 B. & C. 202); nor that writ was indorsed for bail by virtue of an affidavit, &c. (*Wilcoxon* v. *Nightingale*, H. T. 1828, C. P., 4 Bing. 501; S. C. 1 M. & P. 279).

Declaration for a false return need not allege that party was actually in sheriff's custody. (*Dean of Hereford* v. *Macnamara*, M. T. 1824, K. B., 5 D. & R. 95). A count in case against a sheriff, after alleging the delivery of a writ of fi. fa. to him, stated that there were goods within his bailiwick, whereon he might have levied the monies indorsed on the writ, of which he had notice, yet that he

3. *Pleas.*

WRIGHT *v.* LAINSON, T. T. 1837. Ex. 2 *M. & W.* 739.

In an action for a false return, the plea of not guilty only puts in issue the making of the return and not the inducement*.

IN case against the sheriff for a false return of nulla bona, to which the only plea was not guilty—

The Court held, that upon such plea the only matter in issue was the fact of having the money in his possession, and his making the return stated in the declaration; and that in the term "inducement" in Reg. Hil. T., 4 Will. 4, c. 1, was included every thing not involved in the charge alleged against the sheriff, and he could not therefore avail himself of the defence of the bankruptcy of the debtor before the execution of the writ.

had not the monies at the return of the writ, and did not levy the same, but falsely returned that he had seized and taken the goods, which remained unsold for want of buyers: quære, if good. (*Pitcher* v. *King*, M. T. 1838, K. B., 1 P. & D. 297).

A declaration on the 28 Eliz. c. 4, for extortion, stated that the sheriff took more and other consideration than is by the statute limited and appointed in that behalf; that is to say, divers large sums of money, in the whole amounting to the sum of 1*l.* 16*s.* 9*d.*, and more than is in the said act limited and appointed in that behalf:—Held bad on special demurrer. (*Ashby* v. *Harris*, T. T. 1837, 1 N. & P. 673; S. C. 5 D. P. C. 742).

Case against the sheriff, before the 1 & 2 Vict. c. 110. The declaration alleged that a writ of capias ad respondendum was delivered to the sheriff to be executed against R. T., and that the sheriff did not arrest in a reasonable time, and that R. T. did not cause bail to be put in, whereby the plaintiff was injured, and likely to lose his debt:—Held, that the action was not maintainable, no actual damage being shewn in the declaration; and because the sheriff might consistently with its averments, after a reasonable time had elapsed, and after his negligence, have arrested the original defendant, and the plaintiff might have been able to prosecute his action quite as speedily as if the sheriff had arrested on the first opportunity. (*Randell* v. *Wheeble*, E. T. 1840, Q. B., 2 P. & D. 602).

* Under plea of no goods, defendant may shew that the rent exhausted the proceeds. (*Wintle* v. *Freemen*, H. T. 1840, Q. B., 11 Ad. & E. 539; S. C. 1 G. & D. 93). Where plaintiff claimed under the sheriff, and defendant pleaded that the goods were not the plaintiff's, held that the defendant might shew that the sale by the sheriff was not bonâ fide. (*Ashley* v. *Minnett*, E. T. 1838, Q. B., 3 N. & P., 231). Plea, defendant did not take the goods, &c., and levy, &c., modo et formâ, too large an issue, and bad. (*Stubbs* v. *Lainson*, T. T. 1836, Ex., 1 Tyrw. & G. 1000; S. C. 5 D. P. C. 162; 1 M. & W. 728).

In an action against the sheriff for a false return of nulla bona, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead two pleas, one traversing the seizure of the goods of the debtor, and another setting forth the dates of the act of bankruptcy and of the fiat of the defendant in the original action. (*Wright* v. *Lainson*, M. T. 1837, Ex., 6 D. P. C. 152; S. C. 3 M. & W. 44). In an action against the sheriff for a false return of nulla bona to a writ of fi. fa., the allegation in the declaration, that the defendant took goods and chattels of the value of the monies indorsed on the writ, "and then levied the same thereout," imports not only a seizure and a sale under the plaintiff's writ, but also that the sheriff had in his hands the proceeds of the sale for the purpose of handing them over to the plaintiff. Therefore, a plea to such a declaration, alleging "that, before the delivery of the writ therein mentioned, another writ of fi. fa., at the suit of J. F., to levy of the goods of the same party, was delivered to the sheriff, who, after seizing and taking the goods and chattels in execution as in the declaration mentioned, and before the same or any part thereof had been sold or disposed of under and by virtue of such writ, seized and took in execution the said goods and chattels for the purpose of levying the monies directed to be levied by the indorsement on the writ at the suit of J. F., and sold the same for a sum less than the amount of such monies, which sum the sheriff paid over according to the exigency of the writ, at the suit of J. F.," concluding with a verification, was held to be bad on special demurrer as an

DYKE *v.* DUKE, H. T. 1838. C. P. 4 *Bing. N. S.* 197.

IN an action against a sheriff for not arresting, under a ca. sa., a party then being within his bailiwick, as he might and ought to have done, a plea, that the plaintiff did not furnish the defendant with such information as would enable him to recognise and identify the party to be arrested, was held ill, inasmuch as the duty of communicating such information is not imposed upon the plaintiff.

In an action for not arresting, the defendant cannot plead that the plaintiff did not furnish him with evidence so as to identify the prisoner*.

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4. *Replication*†.

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5. *Evidence.*

SCOTT *v.* MARSHALL, H. T. 1832. Ex. 2 *C. & J.* 238; S. C. 2 *Tyrw.* 259.

IN debt on the stat. 23 Hen. 6, c. 9, against the defendants as sheriff of Middlesex, for taking from the plaintiff, by occasion and under colour of their office, the sum of 3*l.*, a larger sum of money than was allowed by law, for letting the plaintiff to bail upon a bill of Middlesex.

The Court held, that the examined copy of a writ, returned with the name of a sheriff's officer indorsed thereon, and proof that process was executed by an officer of that name, and that the practice of the sheriff's office is to indorse on the writ the name of the officer to

An examined copy of the writ, with officer's name indorsed in usual course in the sheriff's office, sufficient to connect the officer with sheriff‡.

argumentative traverse of the allegation, "that the defendant levied the same thereout," and not concluding to the country, or with an absque hoc. (*Drewe* v. *Lainson*, H. T. 1840, Q. B., 3 P. & D. 245).

A bailiff, not having the return of process like the sheriff, is not bound to allege the return; the latter, not having discharged his duty without such return, could not otherwise make out a complete justification. (*Shorland* v. *Govett*, E. T. 1826, K. B., 5 B. & C. 485; S. C. 8 D. & R. 251).

* A declaration in case against a sheriff alleged the recovery of a judgment against W., and the issuing of a writ of testatum fi. fa., directed to the defendant, by virtue of which he seized the goods of W., and remained in possession thereof a long time. Breach, that defendant wrongfully forbore to sell the goods from the 30th April until the 17th May, when he returned that he had taken, &c., the goods of W., and falsely returned that the goods remained in his hands for want of buyers. Pleas, first, that the defendant did not seize or take in execution any goods of W., or remain in possession under the writ; secondly, that the defendant could not, during the time in the declaration mentioned, have sold the goods; thirdly, a fiat in bankruptcy against W., by which the goods vested in the official assignee:—Held, that the first plea was bad for duplicity; that the second plea amounted to the general issue; and that the third plea was an argumentative denial that the goods seized were the goods of W. (*Rowe* v. *Ames*, T. T. 1840, Ex., 8 D. P. C. 750; S. C. 6 M. & W. 747).

† If a defendant in trespass justify under a fi. fa., the plaintiff cannot reply matter which merely shews an excessive levy or extortion. (*Shorland* v. *Govett*, E. T. 1826, K. B., 5 B. & C. 485; S. C. 8 D. & R. 257).

‡ In an action against a sheriff for taking the plaintiff's goods, to connect the sheriff with the affair, it was proved by the officer that he took the goods under a warrant, which he produced, and which he stated that he received from Messrs. A. & Co., the London agents of the sheriff. It was also proved by the undersheriff that Messrs. A. & Co. were the London agents of the sheriff:—Held sufficient. (*Shepherd* v. *Wheble*, 1838, N. P., 8 C. & P. 534). A fi. fa. directed to the coroner issued on a judgment obtained by a plaintiff, and the plaintiff's

whom the sheriff's warrant is delivered, is sufficient to connect the sheriff with the acts of such officer, and to render him liable in an action for extortion.

attorney indorsed thereon the name of S., an officer of the sheriff, who, after the goods seized under the fi. fa. had been sold, received the proceeds from the broker, and did not hand them over. A person, who had bought goods at the sale which had been seized under the fi. fa., but which were afterwards claimed by a third party and taken away from him, brought an action against the sheriff for the purchase-money paid by him, the consideration having failed:—Held, that S. was not the officer of the sheriff, but of the coroner, and that the defendant was not connected with the proceedings so as to be liable. (*Sarjeant* v. *Cowan*, E. T. 1833, Ex., 1 C. & M. 491). In an action against the sheriff for not levying under a fi. fa., and falsely returning nulla bona, the plea of not guilty admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it. The only matters of defence available under that plea are, that he did levy within a reasonable time, and that he did not make the return alleged. (*Lewis* v. *Alcock*, H. T. 1838, Ex., 3 D. P. C. 389). In trover against sheriff, it is sufficient to produce a warrant having the sheriff's seal of office, and it will be presumed to be regularly issued. (*Gibbins* v. *Phillips*, M.T. 1827, K. B., 7 B. & C. 535, n.). In an action against a sheriff for a false return of nulla bona to a writ of fieri facias, in which the question is, whether the goods of the debtor had passed to his assignees under his bankruptcy, the defendant need not put in the deposition of the petitioning creditor to shew what the petitioning creditor's debt was; nor is the defendant limited to the debt only which is stated in the deposition of the petitioning creditor. (*Birt* v. *Stephenson*, 1839, N. P., 8 C. & P. 741). So, in an action for a false return of nulla bona to a fi. fa., if the plaintiff shew the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returned nulla bona. (*Towne* v. *Crowder*, T. T. 1826, N. P., 2 C. & P. 355). The Court will not take judicial notice of an entry in the sheriff's books. (*Russell* v. *Dickson*, H. T. 1830, C. P., 6 Bing. 442). Goods had been taken in execution about the time of the change of sheriffs, and after an action of trover by assignees was set down for trial, the writ, which had not been returned, had been seen with a form of return with the defendant's (the present sheriff) name indorsed, but at the trial the writ was produced with that name erased, and the name of the former sheriff instead:—Held, that, as the first indorsement, if produced, would have been conclusive against the defendant, as rendering him responsible for the sale, it was for the jury to say, whether his name had been put thereon by mistake in the officer, or subsequently erased as an after-thought to turn the plaintiff round; held also, that the plaintiff is not bound by the price of the goods at the sale, though where the plaintiffs, as assignees, would be bound to sell them, it may be considered a fair measure of damages. (*Whitehouse* v. *Atkinson*, T. T. 1828, N. P., 3 C. & P. 345). Taking a bail-bond is not an admission by the sheriff that the arrest was valid. (*Brunskill* v. *Robertson*, T. T. 1839, Q. B., 2 P. & D. 269; S. C. 9 Ad. & E. 840).

When warrant is returned by officer to sheriff, it is sufficient to give latter notice to produce. (*Taplin* v. *Atty*, T. T. 1825, C. P., 3 Bing. 164).

In an action against the sheriff for taking the plaintiff's goods, an affidavit made by his officer on an interpleader application, is admissible in evidence to prove both his agency and his declarations. (*Borichill* v. *Halse*, M. T. 1837, Q. B., 2 N. & P. 426).

A return of nulla bona, made by the sheriff to a fieri facias against A., is admissible in evidence upon the trial of a question as to property in goods at the time of such return between A. and a succeeding sheriff. (*Avril* v. *Sheriff of Warwick*, T. T. 1834, K. B., 3 N. & M. 871).

Declarations made by an officer whilst in possession of goods under a fi. fa., after the return of the fi. fa., are evidence against the sheriff, and no new warrant is necessary after a writ of venditioni exponas to connect the officer with the sheriff. (*Jacobs* v. *Humphrys*, H. T. 1834, Ex., 2 C. & M. 413; S. C. 4 Tyrw. 272). So, where A. sued out a writ of fi. fa. against the goods of B., and the sheriff executed a bill of sale of certain goods to A. After this B. remained in possession of the goods, and the sheriff again took them under another execution against B.:—Held, in an action brought by A. against the sheriff for taking these goods, that the declarations of B. were evidence for the defendant to shew that A.'s execution was merely colourable. (*Willies* v. *Farley*, 1828, N. P., 3 C. & P. 395). So, if an execution-creditor has indemnified the sheriff, what

6. *Question for the Jury* *.

7. *Damages* †.

8. *Costs* ‡. See, also, tit. *Interpleader.*

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9. *Staying Proceedings.*

BEAVAN *v.* DAWSON, E. T. 1830. C. P. 6 *Bing.* 556.

THE sheriff seized, under a fi. fa. issued by a creditor of one L., goods which had previously been conveyed by L. to the plaintiff by bill of sale, of which the sheriff had notice. Both parties refusing to indemnify the sheriff, and the plaintiff having sued him in trespass—

In case of contending executions the Court will stay proceedings against the sheriff§.

The Court ordered the proceedings to be stayed until the plaintiff indemnified the sheriff.

he says is evidence in an action against the sheriff for taking the plaintiff's goods under an execution against a third person. (*Proctor* v. *Lainson*, M. T. 1836, N. P., 7 C. & P. 629). But the declaration of undersheriff, that A. was the officer, inadmissible. (*Snowball* v. *Goodriche*, H. T. 1833, K. B., 1 N. & M. 234: see *Drake* v. *Sykes*, 7 T. R. 113).

An allegation of a judgment for non-performance of certain promises and undertakings, is not supported by proof of a judgment upon one promise and undertaking. (*Edwards* v. *Lucas*, E. T. 1826, K. B., 5 B. & C. 339; S. C. 8 D. & R. 98).

* In an action on the case against the sheriff for not arresting J. W., against whom a writ had issued, it appeared that J. W. was in custody the day after the return of the writ, and that the plaintiff had sustained no damage:—Held, that the jury were properly directed to consider whether J. W. could have been arrested before the return of the writ, and if he could, what damage had been sustained by the plaintiff. (*Barker* v. *Green*, M. T. 1824, C. P., 2 Bing. 317).

† A plaintiff is not bound in an action of trover against the sheriff by the price which the goods fetched at the sale, though where the plaintiffs, as assignees, would be bound to sell them, it may be considered a fair measure of damages. (*Whitehouse* v. *Atkinson*, T. T. 1828, C. P., 3 C. & P. 344). To entitle the plaintiff to damages for unreasonable delay in selling, some injury must be shewn. (*Bales* v. *Wingfield*, M. T. 1833, K. B., 2 N. & M. 831).

‡ When the sheriff is ruled in vacation to bring in the body or return the writ, the Court will not fix the sheriff with costs of any irregularity between the default and attachment, unless the plaintiff, so soon as he discovers the irregularity, gives notice of his intention to proceed against him. (*Rex* v. *Sheriff of Essex*, T. T. 1836, Ex., 1 M. & W. 720).

§ Where actions are brought against the acceptor and the drawer of a bill of exchange, proceedings against the sheriff in the action against the acceptor will be stayed on payment of the debt and costs in that action only. (*Vaughan* v. *Harris*, E. T. 1838, Ex., 3 M. & W. 542). And where the sheriff had neglected to arrest the defendant in an action by the indorsee against the acceptor, and an action was brought against him, the Court directed the proceedings to be stayed upon payment of the debt and costs in that action only. (*Ball* v. *Blackwood*, E. T. 1838, Ex., 6 D. P. C. 589).

The sheriff having, under a fieri facias issued at the suit of a judgment-creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the fi. fa. until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution-creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On te ihssuing of the commission, the assignees took possession of the

(*b*) By Attachment.

1. *For not returning the Writ*.*

2. *For not bringing in the Body†.*

3. *Motion for, and Service of Rule ‡.*

farm, managed it for the benefit of the creditors, and purchased additional stock and farm utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass. (*Bernasconi* v. *Fairbrother*, T. T. 1827, K. B., 7 B. & C. 379). And the Court will not, on an application to set aside a warrant of attorney and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside. (*Cassell* v. *Lord Glengall*, M. T. 1836, B. C., 5 D. P. C. 269).

* In discussing a rule nisi for an attachment against a sheriff for an insufficient return to a writ, the Court will not take cognizance of the return, unless an office copy be produced, verified by affidavit, although there be an affidavit by a party as to his belief that no sufficient return has been made. (*Wilton* v. *Chambers*, M. T. 1835, K. B., 5 N. & M. 431). An attachment lies against the sheriff for not returning a writ of venditioni exponas, pursuant to a Judge's order made in vacation by 13 Reg. Gen., M. T. 3 Will. 4, although that writ is not mentioned in the rule. (*Reg.* v. *Sheriff of Berks*, M. T. 1839, B. C., 8 D. P. C. 97). To entitle a party to an attachment against the sheriff for not obeying a Judge's order to return the writ, the original order must be shewn at the time of serving the copy. (*Granger* v. *Fry*, E. T. 1836, B. C., 5 D. P. C. 21).

Where a sheriff applied for relief under the Interpleader Act, but it appeared that an attachment had been already obtained against him for not returning the writ, the Court would only make the rule absolute on the terms of his paying for moving for the attachment. (*Alemore* v. *Adeane*, H. T. 1835, Ex., 3 D. P. C. 498).

† Where the sheriff being in default put in bail before the 1st October, and on the 2nd November an attachment issued against him for not bringing in the body :—Held, that the Court had no power to relieve him on entering a common appearance under 1 & 2 Vict. c. 110, s. 7. (*Reg.* v. *Sheriff of Middlesex*, M. T. 1838, Ex., 4 M. & W. 529 ; S. C. 7 D. P. C. 82). Semble, that where a plaintiff is entitled to an attachment, pursuant to Reg. Gen., H. T. 3 Will. 4, against the sheriff for not obeying a Judge's order in vacation to bring in the body, although the defendant is afterwards rendered in vacation, he is bound to apply for the attachment *promptly* in the following term. (*Rex* v. *Sheriff of Middlesex*, M. T. 1836, B. C., 5 D. P. C. 245). On the 21st November, the plaintiff ruled the sheriff to return the writ ; the sheriff made his return as of Michaelmas term, and on 30th November, after the sheriff had returned the writ, the plaintiff took out a rule for the sheriff to bring in the body, which was dated as of the last day of Michaelmas term, and served on the 3rd December. The Court granted an attachment against the sheriff for not bringing in the body. (*Heywood* v. *Jackson*, H. T. 1832, Ex., 2 C. & J. 208). But, where the sheriff had entered an appearance, though after the body-rule had expired, the Court refused an attachment for not bringing in the body. (*Harrison* v. ———, Ex., 1 Tyrw. 531).

Cepi corpus being returned by the sheriff to a writ of capias, without a Judge's order or rule of Court, and an order to bring in the body being disobeyed, the plaintiff is entitled to a rule absolute to make the order a rule of Court, and for an attachment under R. G., H. T. 3 Will. 4. (*Bertram* v. *Davis*, M. T. 1837, C. P., 6 D. P. C. 180).

The sheriff in contempt for not bringing in the body :—Held not to be liable for debt and costs beyond the penalty of the bail-bond, and of the costs of the attachment. (*Rex* v. *Sheriff of Devon*, T. T. 1830, K. B., 1 B. & Ad. 159).

‡ A Judge's order, made in vacation, pursuant to the rule of H. T. 3 Will. 4, requiring the sheriff to bring the defendant into Court, &c., may be made a rule of Court, and an attachment may issue for not obeying the order on one motion.

4. *Of the Affidavit* *.

5. *Of the Attachment standing as a Security*†.

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6. *Setting aside.*

REX *v.* SHERIFF OF MIDDLESEX, M. T. 1833. K. B. 2 *N. & M.* 674.—S. P. REX *v.* SHERIFF OF MIDDLESEX, H. T. 1836. EX. 4 *D. P. C.* 673.

Attachment after bail put in set aside‡.

ON application to set aside an attachment, it appeared that bail had been put in and perfected after the contempt, but before the attachment issued against the sheriff.

(*Howell* v. *Bulteel*, M. T. 1834, Ex., 2 C. & M. 339). In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear that the original rule and not a copy was served on the under-sheriff. (*Leaf* v. *Jones*, H. T. 1835, B. C., 3 D. P. C. 315).

* An affidavit, in support of an application by a sheriff to set aside a regular attachment against him for not bringing in the body, must state that the application is made on his behalf, and at his expense. (*Rex* v. *Sheriff of Surrey*, M. T. 1834, Ex., 1 C., M. & R. 581; S. C. 3 D. P. C. 174; S. C. 5 Tyrw. 184). The affidavit, on motion to set aside the attachment against the sheriff, is sufficiently intitled. *Rex* v. ——, without naming the cause, although it may be convenient so to do. (*Rex* v. *Sheriff of Middlesex*, E. T. 1826, K. B., 5 B. & C. 389).

† The Court ordered an attachment against the sheriff to stand as a security where, had bail been duly put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in C. P. in term. (*Rex* v. *Sheriff of Middlesex*, T. T. 1835, C. P., 4 D. P. C. 142). By Reg. Gen., H. T. 2 Will. 4, ordered that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, or perfecting bail above, the attachment shall stand as a security, if the plaintiff shall have declared, and shall have been prevented, for want of special bail being perfected in due time, from entering his case for trial, in a town cause the next term after that in which the writ is returnable, and in a country cause at the ensuing assizes.

‡ The sheriff took a bail-bond with one surety only; he afterwards made a day's default in returning the writ. The Court set aside an attachment obtained against him on payment of costs. (*Rex* v. *Sheriff of Surrey*, M. T. 1835, Ex., 1 Tyrw. & G. 32; S. C. 2 C., M. & R. 698). And where the sheriff takes a bail-bond with only one surety, the Court will not set aside an attachment against him on an application at his instance. (*Reg.* v. *Sheriff of Middlesex*, M. T. 1838, B. C., 7 D. P. C. 313). A render after the expiration of the body-rule entitles the sheriff to have the attachment set aside on payment of costs, although no bail have justified. (*Rex* v. *Sheriff of Middlesex*, H. T. 1836, Ex., 1 M. & W. 182; sed vide 4 D. P. C. 358). Where a week's time had been obtained for putting in bail:—Held, that until such order was discharged the sheriff could not be in contempt for not bringing in the body. (*Rowe* v. *Harvey*, H. T. 1829, C. P., 12 Moore, 158). But, though rendering a defendant is equivalent to justifying bail, for the purpose of setting aside proceedings against the sheriff, yet, where a Judge's order was obtained for time to justify bail, and the defendant was rendered instead of the bail being justified, the Court would not set aside an attachment afterwards obtained, except on payment of costs. (*Rex* v. *Sheriff of Middlesex*, M. T. 1835, Ex., 4 D. P. C. 358).

The Court cannot be applied to to set aside a regular attachment against the sheriff until bail have justified, or the defendant has been rendered. (*Rex* v.

The Court set the attachment aside upon payment of costs, but, as the plaintiff had declared, ordered the attachment to stand as a security.

7. *Against the old Sheriff**.

XIV. RELATIVE TO CRIMINALS†.

Ship and Shipping.

See tit. *Charter-Party*.

I. RELATIVE TO THE OWNERS.

(*a*) Duty and rights of owner, p. 432.

(*b*) Liability of owner, and herein of repairs, p. 432.

II. RELATIVE TO REGISTRY AND SALE OF, p. 433.

III. RELATIVE TO THE CONSIGNEE, p. 434.

Sheriff of Lincoln, M. T. 1835, Ex., 2 C., M. & R. 656; 4 D. P. C. 455; S. C. 1 Tyrw. & G. 93).

The Rule of Mich. T. 59 Geo. 3 is not superseded by the 1 & 2 Vict. c. 110, and the affidavit to set aside the attachment against the sheriff must comply strictly with the terms of that Rule. (*Reg.* v. *Sheriff of Middlesex*, M. T. 1838, Q. B., 8 Ad. & E. 938). An affidavit to set aside a regular attachment against the sheriff on payment of costs must state that the application is made for the indemnity only, and at the expense of the sheriff. (*Rex* v. *Sheriff of Middlesex*, E. T. 1832, B. C., 1 D. P. C. 419).

* A fi. fa. was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff went out of office on the 14th February following. A rule to return the writ was taken out in June following, which was served in the same month on the under-sheriff of the new sheriff, but it was not served on the under-sheriff of the old sheriff till November following:—Held, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular, and the Court set it aside. (*Yaroth* v. *Hopkins*, E. T. 1835, Ex., 3 D. P. C. 711).

In order to obtain an attachment against the "late" sheriff for not returning a writ, it is not sufficient that the order was directed to "the sheriff," although the "late sheriff" had returned the writ, but not in due time. (*Reg.* v. *Sheriff of Cornwall*, E. T. 1839, B. C., 7 D. P. C. 600).

† A sheriff is not bound to execute a criminal who is sentenced to death in his county, if such criminal is not in his custody; and if it is intended by the Court which passed the sentence that the sheriff should do so, there must be a special mandate to the party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner and execute him. On a question whether, by custom, a sheriff of the county is exempt from the duty of executing criminals in his county, and whether, by custom, the sheriffs of a city are bound to do it, evidence of reputation is not receivable. On the trial of an information against a sheriff for refusing to execute a criminal, the warrant to a former sheriff, commanding him to gibbet an offender, and a craving by the sheriff of an allowance of his expenses in so doing, which were allowed by the Chancellor of the Exchequer, are receivable in evidence. (*Rex* v. *Antrobus*, H. T. 1835, K. B., 4 N. & M. 565; 6 C. & P. 784).

IV. RELATIVE TO THE MASTER, CAPTAIN, AND SEAMEN.

(*a*) As to the rights, authority, and liability of the master and captain, p. 434.

(*b*) As to wages, p. 435.

V. RELATIVE TO LADING, BILL OF, p. 436.

VI. RELATIVE TO THE CARGO, TIME OF SAILING, LOADING, AND UNLOADING, p. 437.

VII. RELATIVE TO PASSENGERS AND PASSAGE MONEY, p. 438.

VIII. RELATIVE TO THE CONSTRUCTION OF CONTRACTS RELATING TO, p. 439.

IX. RELATIVE TO THE PILOT, p. 439.

X. RELATIVE TO FREIGHT AND LIEN, AS TO, p. 440.

XI. RELATIVE TO DEMURRAGE, p. 441.

XII. RELATIVE TO AVERAGE AND PRIMAGE, p. 441.

XIII. RELATIVE TO THE BROKER, p. 441.

XIV. RELATIVE TO BOTTOMRY AND RESPONDENTIA, p. 442.

XV. RELATIVE TO THE RUNNING DOWN OF SHIPS, p. 442.

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XVII. RELATIVE TO SALVAGE, WRECKS, AND CONTRIBUTION WHERE CARGO THROWN OVERBOARD, p. 443.

XVIII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) By and against whom maintainable, p. 443.

(*b*) Pleadings, p. 444.

(*c*) Evidence and witnesses, p. 445.

(*d*) Staying proceedings, p. 445.

XIX. RELATIVE TO INDICTMENTS, p. 445.

I. RELATIVE TO THE OWNERS.

(*a*) Duty and rights of owner.

ROBINSON *v.* GLEADOW, T. T. 1835. C. P. 2 *Bing. N. S.* 156.

The managing owner may render the other part owner liable*.

THE defendants were all part owners in ships, of which H. was the managing owner, and the jury found that he had a joint authority to make the insurance, although the party making the insurance did not know who the other parties were, so as to exercise an election.

The Court held, that his giving credit to H. only did not alter the joint liability for the premiums.

(*b*) Liability of owner, and herein of repairs.

FENTON *v.* DUBLIN STEAM PACKET COMPANY, M. T. 1838. Q. B. 1 *P. & D.* 103.

Where owners are to appoint crew, although paid by charterer, the former are liable for negligence†.

THE owners of a steam-vessel, by a charter-party, let the vessel to one D. for six months, agreeing to keep it in good and sufficient order for the conveyance of goods, &c., from Newcastle to Goole, or such other coasting stations as D. might from time to time employ the vessel in; he was to pay all disbursements incident to the working of the steamer, and, among other things, seamen's and captain's

* The law implies a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and prescribed course. (*Davis* v. *Garrett*, T. T. 1830, C. P., 6 Bing. 716).

† If a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage. (*Major* v. *White*, H. T. 1835, N. P., 7 C. & P. 41).

The registered owner of a ship is primâ facie liable for goods furnished for the use of that ship; but such liability may be rebutted by evidence of the credit having been given to others. (*Cox* v. *Reid*, M. T. 1824, N. P., 1 Ry. & M. 199; S. C., N. P., 1 C. & P. 602). Where the plaintiffs, A. & Co., residing abroad, purchased, by directions from B., goods to be transmitted in vessels sent out by B. for that purpose; and the first purchases were sent accordingly, and the first set of bills drawn by A. & Co. on B. duly honoured before the arrival of two of the ships, but at which time none of the latter bills had been honoured; the defendant, the owner and master, delivered the two first cargoes to A. & Co., although consigned to the plaintiffs' agents. In an action against him by A. & Co. for a mis-delivery:—Held, that it was a question for the jury to say if the goods were distinct purchases, and had been paid for, or, if not, whether there had been a neglect or unreasonable delay in the plaintiffs in making claim to detain the goods after they knew of the dishonour of some of the bills. (*Morgan* v. *Skirfield*, 1820, N. P., 3 Stark. 46). Owners are liable for loss of goods, although the agreement with the captain was, that he should make good all losses, receiving a portion of the profits. (*Colvin* v. *Newberry*, E. T. 1828, K. B., 8 B. & C. 166; S. C. 2 M. & R. 47).

Where, by the charter, the ship was to proceed to the Cape, and having delivered goods there to proceed with all convenient speed to Bombay, where the freighter was to load a homeward cargo for England, the captain having the right to the cabins and between decks; at the Cape he took on board a cargo of cattle, &c., with which he proceeded to the Mauritius, and thereby arrived at Bombay six weeks later than he would have done if he had proceeded thither direct from

wages. While the vessel was sailing under this charter-party with a captain and crew appointed by the owners, and D. being on board, but not interfering with the navigation of the vessel, she negligently ran down a boat.

The Court held, that the owners were liable, as the captain and crew were properly to be treated as their servants.

REEVE *v.* DAVIS, T. T. 1834. K. B. 3 *N. & M.* 873; S. C. 1 *Ad. & E.* 312.

As to repairs, the party giving the order is liable*.

THE defendants, the owners, had chartered a steam-vessel to T., who bound himself to do all the repairs, and pay wages and all charges of navigating, and the charterer, who acted as captain, had ordered the repairs done by the plaintiffs, who were unacquainted with the charter-party.

The Court held, that the contract not being made by, nor credit given to, the owners, the action could not be sustained against the latter. The register acts do not affect the question of liability, which depends on immediate ownership.

II. RELATIVE TO THE REGISTRY† AND SALE OF‡.

BOWEN *v.* FOX, M. T. 1829. K. B. 10 *B. & C.* 41.

Where the register is deposited to secure

IN trover, it appeared that the certificate of a ship's register had been deposited as a security for advances for the use of the ship—

the Cape, and the freighter refused to load a cargo. In an action on the charter-party for compensation in damages, the jury having found, upon the point left to them by the Judge, that the deviation was of such a nature and description as to deprive the freighter of the benefit of his contract, and found a verdict for the defendant, the Court held the direction right, and refused to disturb the verdict. (*Freeman* v. *Taylor*, M. T. 1831, C. P., 8 Bing. 124; S. C. 6 M. & P. 182).

In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. (*Muddle* v. *Stride*, H. T. 1840, N. P., 9 C. & P. 380).

The 53 Geo. 3, c. 159, s. 1, is to be construed as if the words "with all her appurtenants" were used therein. (*Gale* v. *Laurie*, H. T. 1826, K. B., 5 B. & C. 156).

* In an action against one of the owners, for work done to a vessel by the order of the ship's husband, such owner will be liable, unless it be shewn that the dealing was, that the person who directed the work to be done should be looked to exclusively. (*Thompson* v. *Finden*, M. T. 1829, N. P., 4 C. & P. 158). Although the owner is liable to the master for money actually laid out for the benefit of the ship, yet he is not liable to a stranger for money advanced, unless expressly for that purpose:—Held, therefore, that, if the money was advanced generally to the master, the owner was not liable, although in fact applied to the necessary service of the ship, but otherwise, if expressly borrowed for that purpose. (*Thacker* v. *Moates*, 1831, N. P., 2 M. & M. 79).

† The registry of ships is regulated by 3 & 4 Will. 4, c. 55, which has introduced various alterations, and consolidates the previous statutes as well as the 6 Geo. 4, c. 110. And the 5 & 6 Will. 4, c. 56, regulates the admeasurement of the tonnage and burthen of the merchant shipping of the United Kingdom.

‡ By deed-poll, dated the 21st of October, 1836, the defendant sold to the plaintiff a ship, with its tackle, &c., and covenanted that he had good right, full

advances, it cannot be recovered in trover.

The Court held, that this gave the holder a lien sufficient to defeat an action of trover for the certificate.

REX *v.* WALSH, T. T. 1834. K. B. 3 *N. & M.* 632.

A conviction on the 6 Geo. 4 and 3 & 4 Will. 4, c. 52, for detaining, must state for what purpose it was required, and what officer made the demand.

ON a conviction under the stat. 6 Geo. 4, c. 110, s. 27, and 3 & 4 Will. 4, c. 55, s. 27, for detaining the certificate of a ship's registry, when required for the purposes of the ship—

The Court held, that it must be made to appear upon the face of the conviction for what purposes it was required, and that it was detained from the proper officer or person entitled by the statute to demand it.

III. RELATIVE TO THE CONSIGNEE.

LUCAS *v.* NOCHELLS, M. T. 1826. C. P. 4 *Bing.* 729.

Where execution is bonâ fide by consignee, he may seize goods on board ship without payment of freight under the charter-party*.

THE consignees of a cargo on arrival, being creditors of the charterer, sued out a fi. fa., and obtained under the sheriff's warrant possession of the goods. In an action of trespass by the owner for entering his ship and taking the goods, plea justifying under the writ of fi. fa., and replication de injuriâ absque &c.

The Court held, that the Judge properly left it to the jury to say whether the goods were taken bonâ fide under the execution, or whether it was not merely colourable to enable the defendants to get possession of and land the cargo as importers, without subjecting themselves to the claim of freight under the charter-party, if they had accepted them as consignees under the bill of lading.

IV. RELATIVE TO THE MASTER, CAPTAIN, AND SEAMEN.

(*a*) AS TO THE RIGHTS, AUTHORITY, AND LIABILITY OF THE MASTER AND CAPTAIN.

FLETCHER *v.* GILLESPIE, T. T. 1826. C. P. 3 *Bing.* 635.

The captain may have an implied authority to employ men to do extra work for the benefit of the owners†.

BY the terms of a charter-party the goods were to be sent alongside the ship at the merchant's expense, the captain rendering the customary assistance with his boats and crew, &c., and a part of the cargo lying at some distance from the edge of the wharf, the captain applied to the factor for labourers to remove it into the boats, to which he replied, he should abide by the charter-party, and the captain employed them to do it.

power, and lawful authority to grant, bargain, sell, assign, and set over the premises:—Held, that this was a covenant that the subject-matter of the transfer existed in the character of a ship at the date of the deed; and if it was physically destroyed, or had ceased to answer the designation of a ship, the covenant was broken. (*Barr* v. *Gibson*, H. T. 1838, Ex., 3 M. & W. 390).

* A consignee of goods is not liable to the ship-owner for general average unless it be expressed in the bill of lading that he is to pay, or that the goods are liable to the charge. (*Scaife* v. *Tobin*, E. T. 1832, K. B., 3 B. & Ad. 523).

† Where there is a written agreement between the master and owners of a

The Court held, that, dehors the contract, it being money paid for work necessary for and beneficial to the owners, they were liable, and that it was properly left to the jury to say if the answer of the factor did not amount to an undertaking to pay, if his principals were liable.

LAMB *v.* BURNETT, H. T. 1831. Ex. 1 *C. & J.* 291; S. C. 1 *Tyrw.* 265.

IN an action for an assault—

The authority of the captain to inflict corporal punishment is not restricted to cases where the ship is at sea*.

The Court held, that the master of a merchant ship has authority over the mariners to enforce obedience to his lawful commands for the navigation of the vessel and preservation of good order, and in case of disobedience or disorderly conduct may inflict corporal punishment, moderate and proportionate to the offence, even where the ship is not at sea.

(*b*) AS TO WAGES.

JESSE *v.* ROY, T. T. 1834. Ex. 1 *C., M. & R.* 316; S. C. 4 *Tyrw.* 626, *supporting* APPLEBY *v.* DODS, 8 *East*, 300.

Where wages are to be paid in the shape of profit on the arrival of the

THE seamen were to receive a share in lieu of wages; and by one article of the agreement it was stipulated, that, "no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel

ship, not mentioning primage, and the owners have received payments in respect of primage from the freighters:—Held, that the master, by usage of trade, is entitled to such payments. (*Charleton* v. *Cotesworth*, M. T. 1824, N. P., 1 Ry. & M. 175).

Where the master of a coasting vessel borrowed money on the credit of the owner in a home port, but where the owner had no agent:—Held, within the scope of his authority, and that it was properly left to the jury, whether necessary or not for the prosecution of his voyage. (*Arthur* v. *Barton*, H. T. 1840, Ex., 6 M. & W. 138).

The master is at liberty to procure another ship to transport the goods to their destination, and will be entitled to the full consideration entered into; and semble, if circumstances render it necessary that another ship be procured, and it can only be obtained at a higher rate of freight, the owner would be bound by the act of his agent and liable for the increased freight. The jury being the proper tribunal to decide as to the propriety of the measure, the Court would not disturb their finding. (*Shipton* v. *Thornton*, M. T. 1838, Q. B., 1 P. & D. 216).

The captain is liable in the first instance for repairs, unless it appears that credit was given to the owners. (*Essery* v. *Cobb*, H. T. 1832, N. P., 5 C. & P. 358).

A ship's husband covenanted that his ship should at one port take in a quantity of brandy, and convey it to another port, and there receive a cargo of fruit, &c., which the freighters of the ship covenanted to supply. He did not take the brandy, and the freighters did not furnish a full homeward cargo, for which he recovered damages against them. They afterwards brought an action against his widow and representative to recover damages for the breach of his covenant:—Held, that they could not recover in any shape in that action, either the damages they had paid him, or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking in the brandy. (*Walton* v. *Fothergill*, T. T. 1835, N. P., 7 C. & P. 392).

* It is the duty of the captain of a merchant vessel in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry with the assistance of others, and to have the result entered in the log. (*Murray* v. *Moutrie*, T. T. 1834, N. P., 6 C. & P. 471).

ship homeward, if disabled, seamen only entitled to wages to that time*.

at London, and the said cargo shall be there sold and delivered, and the money for the same actually received by the owner, nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles." The vessel sailed upon the voyage and procured a cargo, but on her voyage home was disabled and condemned in a foreign port. The cargo was transhipped, and, with the exception of a small portion sold for repairs, was delivered in London, and the freight upon it paid. One of the seamen accompanied the cargo in the vessel to which it was transhipped, but died before it reached London.

The Court held, that the representatives of the seaman were not entitled to his share of the proceeds of the cargo under the agreement, but only to a quantum meruit for his services on board of the second vessel.

V. RELATIVE TO LADING, BILL OF.

DOMETT *v.* BECKFORD, M. T. 1833. K. B. 2 *N. & M.* 374; S. C. 5 *B. & Ad.* 521.

The consignor is liable for freight, though by bill of lading to be paid by consignee†.

GOODS were shipped, according to a bill of lading, "on account and risk of W. B., the defendant, to be delivered to certain persons, or their assigns, paying freight," &c.; and the goods were delivered to the consignees without receiving freight, and they afterwards became bankrupt.

The Court held, that W. B., the consignor, was liable to the ship-owners for the amount of freight.

* A sailor serving under articles providing for a forfeiture of his wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it, owing to his own fault in being absent, though he had no intention of deserting. (*Sherman* v. *Bennett*, H. T. 1833, N. P., 1 M. & W. 489). And, where a seaman about to proceed on a trading voyage entered into and signed articles, whereby he agreed not to sue for wages any of the owners except one, who was the captain, and who alone was a party to the articles:—Held, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages and settled with the seaman. The plaintiff's wages were adjusted and the balance struck, subject to certain deductions for insurance and interest on advances made to him before and during the voyage. It was proved that such charges were the usual ones in trading voyages, and that the accounts were always made out so. The plaintiff remonstrated against those deductions, but ultimately accepted the balance, and gave a receipt for the whole wages:—Held, that he could not recover the amount of such deductions. (*M'Auliffe* v. *Bicknell*, T. T. 1835, Ex., 2 C., M. & R. 263). But, in an action for seamen's wages, brought on an agreement containing a clause of forfeiture, if they should disobey orders or neglect to do their duty:—Held, that if such disobedience or neglect was the consequence of previous misconduct of the owners or captain, the seamen were still entitled to recover. (*Train* v. *Bennett*, T. T. 1827, N. P., 1 M. & M. 82). So, where articles had been signed as required by the 5 & 6 Will. 4, c. 19, and the seaman had quitted the vessel after the voyage and return into port, but before the cargo had been discharged:—Held, that he did not thereby forfeit his whole wages within sect. 9, but the wages of a month only, under sect. 7. (*M'Donald* v. *Jopling*, Ex., 4 M. & W. 285).

† The bill of lading as between the original parties is merely a receipt, but not conclusive as to the quantity of goods shipped, and may be opened by evidence of the real facts. (*Bates* v. *Todd*, 1831, N. P., 2 M. & M. 106). In an action against shippers for not delivering according to bill of lading, they are liable

VI. RELATIVE TO THE CARGO, TIME OF SAILING, LOADING, AND UNLOADING.

ATTORNEY-GENERAL *v.* CATT, M. T. 1837. Ex. 3 *M. & W.* 7.

If the arrangement as to shipping prohibited goods under 6 Geo. 4 be made in England, the offence is triable there*.

ON an information under 6 Geo. 4, c. 108, for being concerned in the unshipping of prohibited goods, which were received on board on the high seas, in prosecution of an agreement arranged at R. in London, and carried strictly into effect, and the goods landed in Ireland—

The Court held, that the latter was an unshipping, in which the defendant was concerned, in England within the meaning of the act, and the offence properly triable in England.

M'ANDREW *v.* ADAMS, T. T. 1834. C. P. 1 *Bing. N. S.* 29; S. C. 4 *M. & Scott*, 517.

There must be a reasonable cause for not sailing at the time named†.

THE defendant entered into a charter-party on the 20th of October with the plaintiffs, by which he bound himself to proceed in ballast to St. Michael's, take in there a cargo of fruit, and return direct to London. The freighters to be allowed so many running days, to commence on the 1st of December; if the vessel did not arrive at St. Michael's on or before the 31st of January, freighters need not load. The defendant made an intermediate voyage to Oporto, and thence back to Portsmouth, whence he sailed for St. Michael's, where he arrived six days after the commencement of the running days mentioned in the charter-party. In an action against him for breach of the charter-party—

Held, that the plaintiffs had a right of action against the defendant for a breach of contract, inasmuch as he did not commence the voyage in a reasonable time, so as to secure the freighters the benefit of an early market; but that they were entitled to merely nominal damages, as they did not prove that they had suffered any special damage in consequence of the late arrival of the vessel.

IRVING *v.* CLEGG, T. T. 1834. C. P. 1 *Bing. N. S.* 53.

A freighter may be entitled to

BY the terms of a charter-party, the freighter was to proceed from certain ports and there load a full and complete cargo of mer-

for the value of the cargo at the time it ought to have been delivered. (*Brandt* v. *Bowlby*, M. T. 1831, K. B., 2 B. & Ad. 933).

The captain cannot sign the bill of lading so as to make a valid transfer. (*Mitchel* v. *Ede*, E. T. 1840, Q. B., 3 P. & D. 513).

In assumpsit by the consignee against the owners for non-delivery of goods shipped, upon plea that the plaintiff did not cause the goods to be shipped, the bill of lading, when produced, shewing the shipment to have been by a third party, who, in fact, was the agent of the plaintiff:—Held, that the bill of lading was not conclusive on the defendant, but that he might show that no goods were actually shipped. (*Berkeley* v. *Watling*, E. T. 1837, Q. B., 2 N. & P. 136).

* A vessel which comes within a league of the coast of the United Kingdom, having had contraband goods on board in the same voyage, though she has unshipped them before coming within the league, is liable to forfeiture under the 3 & 4 Will. 4, c. 53, s. 2. (*Attorney-General* v. *Schiers*, T. T. 1835, Ex. 2 C., M. & R. 286).

† It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party. (*De Medeiros* v. *Hill*, H. T. 1832, C. P., 8 Bing. 231; S. C. 1 M. & Scott, 311; S. C. 5 C. & P. 182).

load with the lightest commodities*.

chandize, the fore-cabin or dining-room included to be filled with light goods. The instrument then specified a certain scale of payment of freight for sugar, coffee, rice, pepper, and for all other goods in a just and fair proportion. The freighter was also to ship, previous to any other loading, 100 tons of rice or sugar, to ballast the vessel, and keep her in proper trim. The freighter duly complied with the last condition, and then took on board a full cargo of pepper; in consequence of which the 100 tons of rice were not sufficient to trim the vessel, and the owner was obliged to make up for the deficiency of cargo by ballast. In an action to recover the amount of freight for merchandize, which should, it was alleged, have been taken on board, so assorted as to render ballast unnecessary—

The Court held, that by the charter-party the freighter was not obliged to put on board a cargo so assorted; and that, having loaded the vessel with 100 tons of rice, it was optional with him to complete the cargo as he thought proper, and to send the lightest commodities.

VII. RELATIVE TO PASSENGERS AND PASSAGE MONEY†.

* Where the ship was chartered for an outward voyage to J. and homeward, either from a port or ports in J., or from a port in S. to a port in the United Kingdom, and provided that if she should be required to go to two or more ports in J., 25*l.* more should be payable, and in case she should be ordered to S. 4*l.* should be paid for every day after the twenty-fifth day of arrival at J., until despatched from the loading port:—Held, that the going to S. from J. was not to be deemed an intermediate voyage, but that having gone for the homeward voyage to S., that was to be deemed the homeward voyage, and the 4*l.* per day, extra time, payable. (*Crozier* v. *Smith*, E. T. 1841, C. P., 1 Scott, N. S. 338; S. C. 1 M. & G. 407). If a larger freight is to be paid, if the ship cannot unload because an enemy be in the port, it is still payable though the ship can return to that port. (*Gibbens* v. *Buisson*, M. T. 1834, C. P., 1 Bing. N. S. 283; S. C. 1 Scott, 133).

In a charter-party, by which a vessel was chartered to go to Whidah, a port on the coast of Africa, where there is no sanatory establishment, it was provided that a certain number of running days should be allowed, to commence from the vessel's arrival at that port, she being in all respects ready to unload, and having received pratique, which is a permission to unload, in reference to a quarantine usually granted in waiting at ports in the Mediterranean. The declaration alleged that the vessel arrived at the port of Whidah on a certain day, being ready to unload, and having received pratique, which allegation was traversed in the plea. The plaintiff having proved that the ship arrived at the port, and was in all other respects ready to unload, and did, in fact, unload, but did not procure any written document, there being no authority to give the same:—Held, that he was entitled to recover. (*Balley* v. *D'Arroyave*, H. T. 1838, Q. B., 3 N. & P. 114).

If a freighter is to discharge within twelve running days after the vessel's arrival, and she is prevented from discharging at first, by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging. (*Rogers* v. *Hunter*, E. T. 1827, N. P., 2 C. & P. 601).

Proviso in a charter-party, that if the ship do not arrive at her port of loading on or before &c., unless prevented by stress of weather or other unavoidable impediment, the freighter should not be obliged to ship a cargo:—Held, that, if ordinary diligence was used in the voyage to reach the port of loading, the owners are within the exception of the proviso, though the ship is delayed till after the stipulated time by causes which extraordinary exertion might have counteracted. (*Granger* v. *Dent*, M. T. 1829, N. P., 1 M. & M. 475; S. P. *Simpson* v. *Henderson*, H. T. 1829, N. P., 1 M. & M. 300).

† Conduct, unbecoming a gentleman in the strict sense of the word, will, it seems, justify a captain of a ship excluding a passenger from the cuddy table

VIII. RELATIVE TO THE CONSTRUCTION OF CONTRACTS RELATING TO*.

IX. RELATIVE TO THE PILOT†.

whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would, in point of law, warrant such exclusion; but it is clear that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. If the husband be excluded from the cuddy table, and the wife, not from compulsion, but from a wish to be with her husband, take her meals with him in private, this will not amount to a breach of contract on the part of the captain so far as regards the wife. (*Prendergast* v. *Compton*, M. T. 1837, N. P., 8 C. & P. 454).

In an agreement under seal for the hire of the cabins and accommodation for passengers in a ship, there was a stipulation, that, if it should be necessary, for the convenience and at the request of the hirer, to put into an intermediate port for stock, or otherwise, he (the hirer) would pay all port and necessary charges consequent thereon:—Held, that this raised an implied covenant on the part of the captain who let the cabins, &c., to put into any such port if required. (*Corbyn* v. *Leader*, E. T. 1833, K. B., 6 C. & P. 32; S. C. 10 Bing. 275; S. C. 3 M. & Scott, 751).

Where a vessel bound for the East Indies is advertised to sail by a certain day and does not, the ship-owner will be entitled to recover half the passage-money of a person who refused to go after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. (*Yates* v. *Duff*, H. T. 1832, N. P., 5 C. & P. 369).

In an action against a captain of a ship for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there was a real grievance sustained by the plaintiff, and there is no right of action unless he has really been a sufferer, for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. (*Young* v. *Fewson*, H. T. 1836, N. P., 8 C. & P. 55).

* Where a charter-party enumerated the articles of the homeward voyage from N., and specified freight on each, with liberty to fill up at M. with other merchandizes:—Held, that it was to be construed that the homeward cargo should consist of those articles or some of them, and that the defendant was liable to pay freight on an average quantity of each, and that the liberty to fill up meant merchandizes ejusdem generis. (*Capper* v. *Forster*, T. T. 1837, C. P., 3 Bing. N. S. 938). By the terms of a charter-party, entered into between merchants and a ship-owner, it was agreed that the ship should load at the port of London, and proceed to Bombay, and there deliver and discharge her cargo, which having done, she was then to load and proceed direct to London, and discharge in the Thames. The merchants to have the privilege of sending the ship to Calcutta from Bombay, they paying at the rate of 17*s.* per register ton per month for the extra time; if the ship returned from Bombay direct to London the merchants to have the power of sending her to one port on the Malabar coast to receive cargo, they paying the ship's port charges and 17*s.* register ton per month for the extra time, the cargoes to be brought and taken from alongside at the expense of the merchants:—Held, that the ship-owner after discharge and delivery of the cargo at Bombay was not bound to proceed with a cargo to Calcutta, inasmuch as the voyages with a cargo, contemplated in the charter-party, were but two, the one from London to the port of discharge, the other directly back, and an intermediate voyage with a cargo was not within the meaning of the instrument or the intention of the parties. (*Cockburn* v. *Wright*, H. T. 1840, C. P., 8 D. P. C. 260; S. C. 6 Bing. N. S. 223).

Semble, that a regulation in the seaman's articles of a merchant ship, that, "every seaman committed to custody for the preservation of good order shall forfeit his wages, together with every thing belonging to him on board the ship," is in point of law a good and proper regulation. (*Rice* v. *Haylett*, T. T. 1828, N. P., 3 C. & P. 531).

† Case against the owner of a vessel for an injury done by her to the plaintiff's barge. Plea, that at the time of the injury the plaintiff was navigating the river Thames, under the conduct of a licensed pilot in charge of her, under and in pursuance of the provisions of the 6 Geo. 4, c. 125, and that the damage was occa-

X. RELATIVE TO FREIGHT, AND LIEN AS TO.

STRONG *v.* HART, H. T. 1827. K. B. 6 *B. & C.* 160.

Where captain has taken a bill of exchange for freight, the owners must object as soon as they hear it*.

THE master of a vessel took a bill from the agent of the consignors for the amount of the freight, and the owners gave no notice of the dishonour of the bill to the consignors, and it did not appear but that the master in the first instance might have had cash instead of the bill if he pleased.

The Court held, that the owner could not afterwards recover the amount of the freight from the consignors, as he ought to have objected to the bill as soon as he knew of it.

sioned by the default of such pilot. Replication, that, previously to the accident the vessel had, on completing a voyage from India, been brought by a licensed pilot into the St. Katharine's dock, and having there discharged her cargo, was at the time of the accident in the act of being removed from that dock to a certain dry dock in the port of London, for the purpose of undergoing repairs; and that the said vessel was not otherwise navigating the Thames:—Held, first, that under the circumstances stated in the replication, the defendant need not have employed a pilot at all, the case being within the exception in the 63rd section; secondly, that the words "wanting a pilot" in the 72nd section, are not to be confined to such vessels as are by the act bound to take a pilot, but are to be construed as applying to any vessel the master or owner of which thinks fit to require one; and thirdly, that, inasmuch as the pilot could not, under the 72nd section, lawfully refuse to come on board when required by the owner to do so, he must be considered as acting in charge of the vessel under the provisions of the act and not as the private servant of the owner, therefore, that the defendant was exempted by the 55th section from all primâ facie liability in respect of the injury occasioned by the default of the pilot. (*Lucey* v. *Ingram*, H. T. 1840, Ex., 6 M. & W. 302). In case for running foul of plaintiff's ship, to which the defence was that the defendant's vessel had, at the time of the accident, a pilot on board:—Held, that it was still a question for the jury to say if the ship was under his management, or if the accident arose from his incapacity. (*Catts* v. *Herbert*, 1820, N. P., 3 Stark. 13).

* Where, in assumpsit for freight, it appeared that the captain, acting under the joint directions of defendants, the shippers, there being no charter-party, parted with the cargo to the party in whose hands he was directed to place it, and received the freight, partly in cash, and partly in a bill, which was not eventually paid, the Judge directed that, if it appeared that he took the bill as the best thing he could do for all parties, the owners were still entitled to recover; but that if he might have had his money but chose to have a bill, that would be a defence. (*Strong* v. *Hart*, T. T. 1825, N. P., 2 C. & P. 55).

A consignee of goods, who is merely agent for the owner, is not liable for the freight implicitly as consignee. But such liability may arise either under the express terms of a bill of lading, or, in cases where there is no bill of lading, from the previous usage and course of dealing between the parties on former occasions of the like nature. (*Coleman* v. *Lambert*, M. T. 1839, Ex., 5 M. & W. 502). And where goods were shipped abroad on board the plaintiff's ship, to be delivered "unto order or assigns, paying freight," and the bill of lading was indorsed by the shipper to the defendant's East India agents in this country, who indorsed it in blank to C. and D., factors at L., who, on presenting it to the plaintiff, received the goods, and were debited by him with the freight; but the goods, upon the bankruptcy of the factors, were claimed and taken possession of by the defendants:—Held, that the defendants could not be made liable for the freight, unless it were shewn that C. and D. were authorized, as agents to the defendants, to undertake to pay the freight in futuro. (*Tobin* v. *Crawford*, E. T. 1839, Ex., 5 M. & W. 235). So, where it was stipulated that, during the voyage, the freighter might hire the vessel for an intermediate voyage, for not less than six months, in which case the master was to re-fit the vessel for such voyage, and the freighter agreed to pay four months of such hire in advance:—Held, that such advance was absolute; and that the vessel being lost within that period did not entitle the freighter to a return of any part, and was not affected by a subsequent stipulation, that, if the vessel should be lost or captured, the freight, by

XI. RELATIVE TO DEMURRAGE*.

XII. RELATIVE TO AVERAGE AND PRIMAGE†.

XIII. RELATIVE TO THE BROKER‡.

time, should be payable up to the time when so lost or captured, or last heard of. (*Saunders* v. *Drew*, T. T. 1832, K. B., 3 B. & Ad. 445). So, on a bill of lading of goods "shipped by A. B., to be delivered to C. D. or his assigns, he or they paying freight," if the goods be delivered without receiving freight, the shipper is not liable for the freight, there being no charter-party. In such a case, where the shipper afterwards promised, by writing, to pay freight:—Held, that it was a question for the jury, whether on the account between A. B. and C. D., A. B. was, as between them, to pay the freight, and that, if he had consented to do so, he was liable on the subsequent promise. (*Drew* v. *Bird*, H. T. 1828, N. P., 1 M. & M. 156). But the charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost after the completion of the trading. (*Pringle* v. *Mollett*, H. T. 1840, Ex., 6 M. & W. 80). So, freighter not liable, where ship chartered by the month, for the time the vessel is under necessary repairs. (*Ripley* v. *Scaife*, H. T. 1826, K. B., 5 B. & C. 167; S. C. 2 C. & P. 132). But an indorsee of a Spanish bill of lading, to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for the delivery to the consignees, without saying, "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement. (*Renteria* v. *Ruding*, E. T. 1830, N. P., 1 M. & M. 511).

An owner retaining the possession of his ship, held to have a lien on the cargo for the freight due under a charter-party, and that the goods being consigned to third parties did not alter the principle. (*Campion* v. *Colvin*, T. T. 1836, C. P., 3 Bing. N. S. 17; S. C. 3 Scott, 338). So, under the ordinary bill of lading, the captain has a lien for freight, whoever may become the owner of the goods. (*Douyal* v. *Kemble*, H. T. 1826, C. P., 3 Bing. 383; see 13 East, 399; 1 Marsh. 146).

Where bills of lading state on the face of them that freight has been paid, owners cannot detain until freight is paid by assignee of bill of lading. (*Howard* v. *Tucker*, H. T. 1831, K. B., 1 B. & Ad. 712).

* No action for demurrage can be maintained by a master of a ship in his own name, unless there be an express contract for its payment to him. (*Evans* v. *Forster*, T. T. 1830, K. B., 1 B. & Ad. 118). A consignee is not liable for the delay of the vessel if he cannot get his goods, because another's goods prevent him, but where the delay is occasioned by his own default, it is no answer to the claim for demurrage that other consignees have already paid to a larger amount for the same period. (*Dobson* v. *Droop*, M. T. 1830, N. P., 1 M. & M. 441; S. C. 4 C. & P. 112).

† Provisions on board for convicts not liable to contribute for average. (*Brown* v. *Stapylton*, M. T. 1826, C. P., 4 Bing. 119). In cases where primage is payable by the consignee of the cargo to the master of a ship, the master may maintain an action for it, though the freight has been separately adjusted. (*Best* v. *Saunders*, T. T. 1828, N. P., 1 M. & M. 208).

‡ Semble, that the broker's commission on the freight of a ship is 5*l.* per cent., unless there be a special agreement, or the ship be chartered upon a tender. (*Brown* v. *Nairne*, M. T. 1839, N. P., 9 C. & P. 204). To enable a broker to recover a commission on the sale of a ship, the mere fact of his having introduced the purchaser to the seller will not be sufficient; but if it appears that such introduction was the foundation on which the negotiation proceed, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands, and deprive him of his commission. The broker will be entitled to his commission if he was, up to a certain time, the agent or middle man between the parties, although the contract be afterwards completed without his instrumentality or interference. (*Wilkinson* v. *Martin*, 1837, N. P., 8 C. & P. 1). By the custom of London, a ship-broker is not entitled to charge for trouble in procuring a charter for a ship where the treaty goes off, and the contract is

XIV. RELATIVE TO BOTTOMRY AND RESPONDENTIA *.

XV. RELATIVE TO THE RUNNING DOWN OF SHIPS †.

XVI. RELATIVE TO THE MORTGAGE OF.

BRIGGS *v.* WILKINSON, T. T. 1827. K. B. *7 B. & C.* 30.

Mortgagor no implied authority to pledge the mortgagee for stores supplied to the ship‡.

A., THE managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, and B. did not take possession or interfere in the concerns of the ship.

The Court held, that he was not liable for repairs and necessaries done and supplied in pursuance of A.'s orders.

incomplete, although it goes off through the act of the owner. (*Broad* v. *Thomas*, T. T. 1830, C. P., 7 Bing. 99; S. C. 4 C. & P. 338).

A broker is not entitled to commission where he does not actually procure the hire of a ship. (*Read* v. *Rann*, M. T. 1829, K. B., 10 B. & C. 438; S. P. *Broad* v. *Thomas*, T. T. 1830, C. P., 7 Bing. 99).

* The master, before he resorts to a bottomry bond, is bound to ascertain whether the supplies can be obtained on the personal credit of the owners; and where a party is bound to know a fact, he must shew that he has exercised due diligence to ascertain the fact. (*Heathorn* v. *Darling*, 1836, 1 Moore, P. C. 5).

Where money was lent on a bond purporting on the face of it to be a respondentia:—Held, that it was properly left to the jury to say, whether the transaction was bonâ fide on respondentia, or only colourably so, and that it was not necessary to leave it as a distinct question, whether the money was lent to a person having no interest in the vessel or cargo, to raise which the pleas should have alleged that it was not intended to lay out the money borrowed in goods to be put on board the ship. (*Wynne* v. *Crosthwaite*, M. T. 1830, N. P., 4 C. & P. 178).

† To enable a party to maintain an action for an injury to his ship, by the unskilful navigating of the defendant's ship, the injury must be attributable entirely to the fault of the crew of the latter; if there has been want of care on both sides, the action cannot be maintained. (*Vanderplank* v. *Miller*, E. T. 1828, N. P., 1 M. & M. 169).

If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appear that the accident happened from circumstances which persons of competent skill could not guard against, the plaintiff will not be entitled to recover, nor will he if his men had put his barge in such a place that persons using ordinary care could not run against it; nor if the accident could have been avoided but for the negligence of the plaintiff's own men in not being on board his barge at a time when it was lying in a dangerous place. (*Lack* v. *Seward*, M. T. 1829, N. P., 4 C. & P. 106).

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward, and although such vessel may either go to leeward or windward, as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. (*Handasyde* v. *Wilson*, T. T. 1828, N. P., 3 C. & P. 528).

‡ Where a party, the owner of two ships and of part of a third, whilst they were absent at sea, executed a bill of sale thereof by way of mortgage, and it was registered before their return, contrary to the provisions of 6 Geo. 4, c. 110, s. 39, and by a subsequent bill of sale, to which the former mortgagees were parties, all the interest of the mortgagors, and the policies effected and freight payable, were assigned subject to the prior mortgage, which latter bill was also registered before their return to port, the mortgagor became bankrupt, and, upon the

XVII. RELATIVE TO SALVAGE, WRECKS, AND CONTRIBUTION WHERE CARGO IS THROWN OVERBOARD.

HUNTER *v.* PARKER, M. T. 1840. Ex. *7 M. & W.* 322.

THE captain of a vessel wrecked, found afterwards to be justified by extreme necessity, directed an auctioneer by letter, not under seal, to sell her, which was done, and the balance paid over and received by the owners without objections; but it appeared that the sale was made by the auctioneer by an instrument under seal, and in his own name, but duly reciting the certificate of registry.

The captain of a vessel may authorize the sale of a ship wrecked by writing without seal*.

The Court held, that as the sale would have been valid if in writing without seal, and purported to convey the interest which, as agent, he was empowered to convey, it operated both as the deed of the agent, and as a written transfer from the owner, which the Court would give effect to.

XVIII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) BY AND AGAINST WHOM MAINTAINABLE.

FRAGANO *v.* LONG, E. T. 1825. K. B. *4 B. & C.* 219.

A RESIDENT at Naples sent an order to M. & Co, hardwaremen at Birmingham, "to dispatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival." M. & Co. (having marked the package with A.'s initials) dispatched

A party who has ordered goods to be consigned to him, and an in-

return of two of the ships, their certificates were duly indorsed with the particulars of the bills of sale:—Held, that the latter of them was valid as to the interests assigned, and also as to the sums due on the policies of insurance as against the assignees of the bankrupt, and as far as choses in action can be assigned. (*Ex parte Jones*, T. T. 1833, Ex., 3 Tyrw. 671).

On the mortgage of a ship, the right to freight passes. (*Dean* v. *M'Ghie*, M. T. 1826, C. P., 4 Bing. 45).

And the mortgagee is entitled to freight accruing subsequent to the mortgage. *Kerswill* v. *Bishop*, T. T. 1832, Ex., 2 C. & J. 529; S. C. 2 Tyrw. 602).

It is a question for the jury, when a mortgagee insures for more than his own interest, whether the residue was intended for the mortgagor; but he is not entitled to recover more than the value of the ship. (*Irving* v. *Richardson*, E. T. 1831, K. B., 2 B. & Ad. 137; S. C. 2 M. & M. 153).

* A ship being on shore received assistance from the owner of a smack, who put down an anchor and hawser attached to the ship, and left the latter, having its deck under water, for the purpose of carrying away some ship's stores, but with an intention to return:—Held, that the anchor and hawser were not parted with or left, within the meaning of the 1 & 2 Geo. 4, c. 75, s. 1, so as to warrant a claim to salvage in persons who came and took them up. (*Clark* v. *Chamberlain*, M. T. 1836, Ex., 2 M. & W. 78).

In an action by a ship-owner for contribution in respect of general average, the defendant is entitled to an inspection of the statement of the general average, but not of the documents from which it is drawn up. (*Tunzell* v. *Allen*, T. T. 1839, Ex., 7 D. P. C. 496). And where the ship-owner has, by the custom of the trade, the privilege of stowing certain goods upon the deck, the proprietor of such goods has a right to contribution against the ship-owner if such goods are thrown overboard for the benefit of the preservation of the rest of the cargo. (*Gould* v. *Oliver*, M. T. 1837, C. P., 4 Bing. N. S. 134).

surance effected, may maintain an action against the ship-owner for negligence.

the goods by canal to Liverpool, and effected an insurance, declaring the interest to be in A. At Liverpool the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged.

The Court held, that the property in the goods vested in A. as soon as they were dispatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner.

(*b*) Pleadings *.

GATLIFFE *v.* BOURNE, H. T. 1838. C. P. 4 *Bing. N. S.* 314.

The defendant cannot plead the goods were landed at a wharf and destroyed by fire†.

THE plaintiff declared, upon a contract by the defendants, safety and securely to carry and convey goods by a steam-vessel from Belfast to London, thence to the port of London, and deliver the same at the port of London, to the plaintiff or his assigns; and alleged, as a breach, that the defendants so carelessly and negligently conducted themselves about the carrying of the goods, that they became wholly lost to the plaintiff. Pleas, that, after the arrival of the steam-vessel in London, the defendants caused the goods to be unshipped, and deposited on a certain wharf, &c., fit and usual for their reception, there to remain until they could be delivered to the plaintiff; and that after the arrival of the said steam-vessel, &c., the defendants were ready and willing to deliver the goods to the plaintiffs or his assigns; but neither the plaintiff nor his assigns were ready to receive the same, whereupon the defendants caused the goods to be unshipped, and safely landed and deposited on the wharf, &c., fit and proper to receive the same; each plea concluding with the statement of the destruction of the goods by a fire, which broke out accidentally, and without any negligence, &c. on the part of the defendants.

The Court held the pleas bad, inasmuch as by such pleas the defendants wished to substitute a landing at the wharf for the delivery prescribed by the bill of lading, and because it did not appear by the pleas that the plaintiff had a reasonable time allowed him to receive his goods over the ship's side before they were unloaded and placed

* In a declaration on an agreement of charter-party to put a cargo on board at M., and pay freight by bill on L. at three months:—Held, on motion in arrest of judgment, that the breach assigned, that the defendant did not put a cargo on board, whereby plaintiff incurred expenses in procuring one, and did not pay those expenses, nor give the bill provided for, contrary &c., was good, it being in substance but one breach; and that the negotiation as to the bill was unnecessarily introduced. (*Hoggett* v. *Exley*, H. T. 1840, C. P., 6 Bing. N. S. 207; S. C. 9 C. & P. 324).

† In assumpsit for demurrage upon an agreement in the nature of a charter-party, non-compliance by the plaintiff with the provisions of 3 & 4 Will. 4, c. 52, s. 108, requiring that, previous to the unlading of goods carried coastwise, a written notice of the ship's arrival with goods, signed by the master, shall be given to the collector or controller of customs by the master, owners, wharfinger, or agent of such ship, and proper documents obtained,—should be specially pleaded, and cannot be set up as a defence under non-assumpsit. (*Alcock* v. *Taylor*, E. T. 1836, K. B., 6 N. & M. 296).

upon the wharf, and there was no statement of a law or custom of the port by which such mode of delivery was warranted and sanctioned.

(*d*) Evidence and witnesses*.

(*e*) Staying proceedings†.

XIX. RELATIVE TO INDICTMENTS‡.

Shooting§. See 9 *Geo.* 4, *c.* 31.

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* Where, in an action on a breach of contract to convey on board of plaintiff's ship a boat, not exceeding certain dimensions, which, when tendered, proved to be a *decked* boat within that size, which the plaintiff refused to receive, unless the defendant would consent to remove the deck, as obstructing the navigation of the ship:—Held, that evidence of its being always usual to take off the deck of such boats in stowing them was properly admitted, and the plaintiff, having declined to permit it, he could not recover for breach of the contract. (*Haynes* v. *Halliday*, T. T. 1831, C. P., 7 Bing. 587).

In an action upon a charter-party, the Court refused to compel the inspection of the log-book, no sufficient ground being laid before the Court for its interference according to decided cases. (*Rundle* v. *Beaumont*, M. T. 1827, C. P., 4 Bing. 537; S. C. 1 M. & P. 396; see 3 Bing. 148; 4 Id. 539; S. C. 1 M. & P. 334).

In assumpsit for repairs against a part owner:—Held, that after a release a co-partner was a competent witness for the defendant. (*Jones* v. *Pritchard*, M. T. 1836, Ex., 2 M. & W. 199). And where a party elects to sue the owner for repairs, the captain is a competent witness. (*Castle* v. *Duke*, H. T. 1832, N. P., 5 C. & P. 359).

† Where an action has been brought, and a verdict obtained by the proprietor of injured goods against the owner of a vessel in which the injury has accrued to the goods, and the owner has filed his bill for relief in equity, pursuant to the 53 Geo. 3, c. 159, s. 7, the Court will not under sect. 6 of the act, during the pendency of the equity suit, restrain the plaintiff from proceeding. (*Thiseldon* v. *Gibbons*, E. T. 1840, B. C., 8 D. P. C. 419).

‡ Upon an indictment for setting fire to a ship, of which the prisoner was a part owner:—Held, first, that under 6 Geo. 4, c. 110, two or more persons might hold shares jointly; secondly, that declarations of the prisoner, shewing who were part owners, were insufficient to establish part ownership, if, by reason of the invalidity of the registry evidencing the transfer, the legal title could not be established; but that the entry with a date, having no application, unless it applied to the production of the bill of sale before the officer making it, was sufficient, although it did not expressly state such production; and, lastly, that the intent to prejudice was implied by the act itself. (*Rex* v. *Philp*, 1830, 1 Moo. C. C. 263).

§ *What constitutes the offence.*]—Shooting into a room where the prosecutor was supposed to be, but in fact was not:—Held, not to be shooting "at" within the statute. (*Rex* v. *Lovel*, 1837, N. P., 2 M. & Rob. 39). But where the prisoner shot at A., and struck B., held to amount to the offence of shooting at B. (*Rex* v. *James*, 1837, N. P., 2 M. & Rob. 40). Where the prisoner, by snapping a percussion cap, discharged a gun-barrel detached from the stock:—Held, that the material words of the 9 Geo. 4, c. 31, ss. 11, 12, were "shall shoot at," and that the gun-barrel was "loaded arms," within the statute. (*Rex* v. *Coates*, 1834, N. P., 6 C. & P. 394). But sending a box filled with gunpowder

Short Notice of Trial. See tit. *Trial.*

Similiter*. See tit. *Issue.*

and detonators, so as to explode on being opened:—Held not an attempt to discharge loaded arms within 9 Geo. 4, c. 31, ss. 11, 12. (*Rex* v. *Mountford*, 1835, N. P., 7 C. & P. 242).

Indictment.]—If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. (*Rex* v. *Hughes*, 1832, O. B., 5 C. & P. 126). A count, which charges B. with shooting at A., with intent to murder him, and then charges C. and D. with aiding and abetting B., and at the end of the count concludes with a contra formam statuti, is good; and it need not state that B. shot A. with intent, &c., contra formam statuti, and that C. and D. aided him, also contra formam statuti. (*Rex* v. *Nelmes*, 1834, N. P., 6 C. & P. 347). On an indictment for maliciously shooting, one act of shooting may be laid in one set of counts as being with intent to murder, &c., H.; and in another set of counts as with intent to murder, &c., L. A person intending to shoot at and kill L., shot at H., mistaking him for L., but did not kill H. On an indictment in the usual form, for shooting at L., with intent to murder H., &c., the Judge left it to the jury to say, whether there was an intent to murder H.; but his Lordship laid it down, that the law infers that the party intends to do that which is the immediate and necessary effect of the act which he commits. The jury found that the prisoner did not intend to do any harm to H., and the Judge directed an acquittal to be recorded. If, after the grand jury are discharged, a prisoner charged with maliciously shooting is acquitted, the Judge will not order the prisoner to be detained, while articles of the peace against the prisoner are prepared. (*Rex* v. *Holt*, 1836, N. P., 7 C. & P. 518).

Evidence.]—If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms," within the stat. 9 Geo. 4, c. 31, ss. 11, 12. (*Rex* v. *Harris*, 1831, N. P., 5 C. & P. 159). Whether, on a count charging a shooting with intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued:—Quære. (*Reg.* v. *Jones*, 1840, N. P., 9 C. & P. 258).

* By Reg. Gen., H. T. 2 Will. 4, it is enacted, "That, in all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin." Where the issue contained an "&c." after the replication, and no similiter was added, but it was properly added on the nisi prius record:—Held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and a rule for arresting the judgment was discharged: and, semble, the Rule of Trin. Term, 2 Will. 4, s. 85, was intended to apply only to cases tried in term. (*Brook* v. *Finch*, H. T. 1837, K. B., 6 D. P. C. 313). A party, by opposing a summons for a writ of trial, does not waive any irregularity in the issue. (*Middleton* v. *Hughes*, H. T. 1840, Ex., 8 D. P. C. 170). And where a replication traversed the facts contained in the plea, and concluded to the country, but without an "&c.," and no similiter was added:—Held, that the omission might be considered as a misprision of the clerk, and amendable after verdict, judgment, and writ of error brought. (*Siboni* v. *Kirkman*, M. T. 1837, Ex., 6 D. P. C. 98; S. C. 3 M. & W. 46).

If the common similiter is added by a party for himself, it need not be dated, as it is not a pleading within 1 Reg. Gen., H. T. 4 Will. 4. (*Edden* v. *Ward*, T. T. 1840, B. C., 4 P. & D. 155; S. C. 8 D. P. C. 725). In a former case, it was held it should be dated. (*Middleton* v. *Hughes*, H. T. 1840, Ex., 8 D. P. C. 170).

Simony*. See 7 *Geo.* 4, *c.* 94; and, ante, tit. *Advowson.*

Slander.

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III. RELATIVE TO THE ACTION FOR.

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(*b*) Pleadings.

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(*f*) New trial, p. 455.

(*g*) Arrest of judgment, p. 455.

* Special bonds of resignation held illegal and void, both at common law, and against 31 Eliz. c. 6, per *Eldon*, L. C., *Abbott*, L. C. J., *Alexander*, L. C. B., *Park*, J., and *Graham*, *Garrow*, and *Hullock*, B. B.; contra *Best*, L. C. J., *Burrough* and *Gaselee*, J. J. (*Fletcher* v. *Lord Sondes*, 3 Bing., C. P., 501). The 31 Eliz. c. 6, (against resignation-bonds), restrained in cases where a person, or one of two persons in whose favour the bond to resign is given, is specially named; but if such nominee be not presented within six months, the resignation to be void.

I. RELATIVE TO WHAT WORDS DO OR DO NOT AMOUNT TO.

(*a*) Of words not actionable in themselves.

Ward *v.* Weeks, M. T. 1830. C. P. 7 *Bing.* 211.

Where words, not actionable in themselves, the special damage must be proved as alleged*.

In an action of slander, averring special damage to have accrued to the plaintiff from the speaking of the words by the defendant; evidence that the words were spoken by the defendant to J. S., who repeated them to J. B., who thereupon refused to trust the plaintiff—

The Court held, not sufficient to support the action, because when words were not actionable without special damage, special damage must be proved as alleged.

Smith *v.* Thomas, M. T. 1835. C. P. 4 *D. P. C.* 333; S. C. 2 *Bing. N. S.* 372.

But when special damage not gist of action, plaintiff may recover, though not proved.

Per Cur.—In slander, where the words are in themselves actionable, the special damage is not the gist of the action, and the plaintiff, if he fails in proving it, may still resort to and recover his general damages; a traverse, therefore, of such an allegation is immaterial and improper.

(*b*) Of confidential and privileged communications.

Kelly *v.* Partington, M. T. 1833. K. B. 2 *N. & M.* 460; S. C. 5 *B. & Ad.* 645.

Words spoken by a master in giving a character to a servant are privileged unless malice†.

Words were spoken by a master in giving a character to a servant. In an action of slander, brought by the servant—

The Court held, if from the circumstances under which, and the manner in which, they were spoken, there is a possibility of the

* Accusing a party of doing what he could not possibly do is not actionable. (*Jackson* v. *Adams*, M. T. 1835, C. P., 2 Bing. N. S. 402; S. C. 2 Sc. 599). So, saying a party was forsworn, without special damage or reference to other matters, is not actionable. (*Hall* v. *Weeden*, E. T. 1827, K. B., 8 D. & R. 140).

† The existence of express malice is only requisite when the injurious expressions are used on a lawful occasion. (*Hooper* v. *Truscott*, H. T. 1836, C. P., 2 Scott, 677; S. C. 2 Bing. N. S. 457). It is a question for the jury whether the alleged communication was made bonâ fide or not. (*Padmore* v. *Lawrence*, H. T. 1840, Q. B., 3 P. & D. 209). Where the slander was proved to have been spoken in a manner quite inconsistent with the notions of a confidential communication, yet held, that the Judge was not bound to tell the jury that if they believed the evidence they must find for the plaintiff, and that his telling them that the question was, whether they believed it to be a bonâ fide communication, for the purpose of putting people on their guard, was not a misdirection. (*Picton* v. *Jackman*, H. T. 1830, N. P., 4 C. & P. 257). If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, and that he did it in a proper manner. (*Wilson* v. *Collins*, E. T. 1832, N. P., 5 C. & P. 373). Where the defendant informed the bail that his principal was likely to abscond, and procured directions to take the affidavit of justification off the file, but which being too late, an order for the render was obtained from a Judge:—Held, that unless express malice was alleged and proved, no action could be maintained for such proceeding. (*Porter* v. *Weston*, T. T. 1839, C. P., 8 Scott, 25; S. C. 5 Bing. N. S. 715). And where the words spoken, imputing habits

master having been actuated in what he said by any other motive than that of giving what he conscientiously believed to be a true character of the servant, the action was maintainable; and the proper question for the jury was whether the words were spoken maliciously or not.

(*c*) Of words relating to trade or professions.

THOMAS *v.* JACKSON, E. T. 1825. C. P. 3 *Bing.* 104.

Saying of a corn-factor, "You are a rogue and a swindling rascal, you sold me worse oats than I bargained for," is actionable*.

IN an action of slander the plaintiff declared that he was a farmer and vendor of corn, and alleged that the defendant said of him, "that he was a rogue and swindling rascal, and that he had delivered to the defendant 100 bushels of oats worse by sixpence a bushel than he bargained for."

The Court held, that these words were actionable without proof of special damage, as they imputed fraud to the plaintiff in his business of a vendor of corn.

(*d*) Of words imputing incontinency†.

of intemperance to the plaintiff, a dissenting preacher, were in answer to inquiries:—Held, that, being spoken bonâ fide, they were privileged, unless the defendant could establish malicious motives. (*Warr* v. *Jolly*, T. T. 1834, N. P., 6 C. & P. 497). And if A. is going to have dealings with B., and he make inquiries of C., who gives A. information respecting B., this is a privileged communication, as every one is quite at liberty to state his opinions bonâ fide of the respectability of the party thus inquired about. (*Storey* v. *Challands*, M. T. 1837, N. P., 8 C. & P. 234). And where a builder was employed by a landlord to do repairs:—Held, that communications made by the tenant of his improper conduct to the latter's agent were privileged. (*Toogood* v. *Spyring*, T. T. 1834, Ex., 1 C., M. & R. 181; S. C. 4 Tyrw. 583). But the communications between the members of a charitable institution, respecting the conduct of their officers, are not privileged. (*Martin* v. *Strong*, M. T. 1833, K. B., 5 Ad. & E. 535; S. C. 1 N. & P. 29). So where, in an action of slander against the defendant, a surveyor, employed by a committee to investigate the truth of reports against the plaintiff as having executed improperly contract work for them, which the defendant alleged, on such inquiry, to be the case:—Held, that such report was not a privileged communication, it being found by the jury that the reports originated with the defendant, and were false. (*Smith* v. *Matthews*, 1831, N. P., 2 M. & M. 151). So words spoken to an officer who has a warrant to search the plaintiff's house for goods suspected to have been stolen from the defendant, were not a privileged communication. (*Dancaster* v. *Hewson*, E. T. 1828, K. B., 2 M. & R. 176).

* Imputing insolvency to an innkeeper actionable though plaintiff not subject to bankrupt laws. (*Whittington* v. *Goodwin*, H. T. 1826, K. B., 5 B. & C. 180; S. C. 2 C. & P. 146). But, words spoken of a tradesman which impute to him impropriety in moral conduct and the prostitution of a female employed by him in his shop, (though alleged to be spoken of him in his trade), are not actionable unless they can be construed to mean that he keeps an improper house. (*Brayne* v. *Cooper*, E. T. 1839, Ex., 5 M. & W. 249).

Words spoken of an attorney, to render them actionable as such, must be spoken distinctly in reference to his profession. (*Doyley* v. *Roberts*, T. T. 1837, C. P., 3 Bing. N. S. 835).

† Words imputing incontinency to plaintiff not actionable without special damage or spoken of him in respect to some particular pursuit. (*Lumby* v. *Allday*, H. T. 1831, Ex., 1 C. & J. 301; S. C. 1 Tyrw. 217).

(*e*) Of words imputing a crime.

ROWCLIFFE *v.* EDMONDS, T. T. 1840. Ex. *7 M. & W.* 12.

Saying "You robbed me, for I found the thing you have done it with," is actionable*.

THIS was an action of slander. The words were, "You robbed me, for I found the thing you have done it with." On demurrer—

The Court held the words actionable, per se, without any colloquium or innuendo to explain the subject-matter to which they referred.

II. RELATIVE TO THE CONSTRUCTION OF WORDS AND PUBLICATION OF ANOTHER'S SLANDER†.

III. RELATIVE TO THE ACTION FOR.

(*a*) Who may join‡.

* So, saying "He is a thief, you have robbed me of my bricks," is actionable. (*Slowman* v. *Dutton*, H. T. 1334; C. P., 10 Bing. 402; S. C. 4 M. & Scott, 174). So, the words, "You have committed a crime for which I can transport you," are actionable. (*Curtis* v. *Curtis*, E. T. 1834, C. P., 10 Bing. 417; S. C. 4 M. & Scott, 337; S. C. 3 M. & Scott, 819). And, in slander for words, "He is a returned convict:"—Held actionable, although importing that the punishment had been suffered, the obloquy remaining. (*Fowler* v. *Dowdney*, 1837, N. P., 2 M. & Rob. 119). So, the words, "I think the business ought to have the most rigid inquiry, for he murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death:"—Held actionable, as imputing at least a charge of manslaughter, and, at all events, if doubtful, the doubt would be cured by the finding of the jury. (*Ford* v. *Primrose*, M. T. 1824, K. B., 5 D. & R. 287).

A declaration in case for words, "that the plaintiff had set fire to his own barley-stack," averred that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of and concerning the plaintiff, and the fire:—Held bad on demurrer. (*West* v. *Smith*, H. T. 1836, Ex., 4 D. P. C. 703).

The question in an action for words imputing a crime is, not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them. (*Read* v. *Ambridge*, H. T. 1834, N. P., 6 C. & P. 308).

† A man has a right to communicate to any other any information he is in possession of in a matter in which they have a mutual interest; and it is a perfectly legal and justifiable object for one to induce another to become a party to a suit as to a subject-matter in which both have an interest. (*Shipley* v. *Todhunter*, T. T. 1836, N. P., 7 C. & P. 680). And it is not because strong or angry language is used in such a communication that it will be a libel, but the jury must go further and say not merely whether expressions are angry, but whether they are malicious. In an action of slander for words, some of which, if spoken and understood in their ordinary sense would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to shew that they were not intended to convey the idea which their primary and ordinary meaning would give.

If a defendant in an action for verbal slander, at the time of speaking the slander gave out the name of the person from whom he heard it, this is no justification: but, if he did this, and at the trial prove that he did in fact hear the slander from that person, that will go in mitigation of damages. (*Bennett* v. *Bennett*, 1834, N. P., 6 C. & P. 588).

‡ Where the gist of the action is special damage, the wife cannot be joined for slander of both husband and wife. (*Saville* v. *Sweeney*, H. T. 1833, K. B., 1 N. & M. 254).

Where several parties have a joint interest affected by the slander, they may sue jointly. (*Foster* v. *Lawson*, E. T. 1826, C. P., 3 Bing. 452; see 3 B. & P., 150; 2 Saund. 116, n. (*a*)).

(*b*) Pleadings.

1. *Declaration.*

1.—*Statement of the Words.*

Gutsole *v.* Mathers, E. T. 1336. Ex. 1 *M. & W.* 495.

In a declaration in slander alleging special damage resulting to the plaintiff from the speaking of words impugning his title to certain goods—

In an action for slander of title, the words used must be set out verbatim*.

The Court held it necessary to set forth in the declaration the words actually spoken; and where that was not done, the Court arrested the judgment after a verdict for the plaintiff.

2.—*Inducement* †.

3.—*Innuendo.*

Day *v.* Robinson, T. T. 1834. K. B. 1 *Ad. & E.* 554.

The words in one count were, "You have robbed me of 1*s.* tan money;" innuendo that he had wrongfully taken to his own use

The innuendo should corre-

* But, a count alleging, that valuable tulips were about to be sold by plaintiff, and that the defendant asserted and represented that the *said* tulips were stolen property:—Held sufficient, without stating that the defendant spoke the words of and concerning the tulips, the property of the plaintiff. (*Gutsole* v. *Mathers*, supra). Words spoken "of" must not be stated as words spoken "to" the plaintiff. (*Stannard* v. *Harper*, M. T. 1829, K. B., 5 M. & Ry. 295).

Where a count charges embezzlement on a corporate officer, contrary to the form of the statute, he must be shewn to be an officer within the statute. (*Williams* v. *Scott*, T. T. 1833, Ex., 1 C. & M. 675; S. C. 3 Tyrw. 688).

The declaration alleged that the plaintiff was an auctioneer and appraiser, and had been employed by defendant as an appraiser to value certain goods, and that, intending to injure him in his business of an auctioneer, the defendant spoke of him and of his conduct as to such valuation, "He is a damned rascal; he has cheated me out of 100*l.* on the valuation:"—Held, sufficient to shew that the slander was of and concerning the plaintiff in the way of his trade, and sufficient after verdict. (*Bryant* v. *Loxton*, E. T. 1826, C. P., 11 Moore, 344).

The words laid in the declaration were, "I will do my best to transport him, as he has been working for me for some time and has been robbing me all the while;" the proof being, "He has worked for me for some time and has been continually robbing me:"—Held, no variance. (*Dancaster* v. *Hewson*, E. T. 1828, K. B., 2 M. & R. 176). But, where the declaration in slander stated, that the defendant, intending to injure the plaintiff in the opinion of certain persons, who had been in the habit of employing him as a fruit-broker, represented to those persons that the plaintiff had prejudiced the sale of a cargo of oranges belonging to them, by reporting in the sale-room, that he (the plaintiff) had three or four ships laden with fruit between Gravesend and London. The proof at the trial was, that the plaintiff had said that there were three or four ships laden, &c. This was held, at Nisi Prius, to be a fatal variance, and the plaintiff was nonsuited, and the nonsuit was confirmed in the court above, a rule for setting it aside being refused. (*Wood* v. *Adams*, H. T. 1830, C. P., 6 Bing. 481; S. C. 4 C. & P. 268).

† A declaration for slander stated a colloquium "of and concerning certain meat which J. G. had purchased of the plaintiff, who had purchased the same of other persons, and had paid for the same," and alleged the publication of defamatory words, imputing that the plaintiff had stolen the money with which he had paid for the meat:—Held, that the averment that the plaintiff had purchased and paid for the meat was immaterial, and, therefore, that the failure by the plaintiff to prove those facts did not constitute a variance. (*Cox* v. *Thomason*, E. T. 1832, Ex., 2 C. & J. 361; S. C. 2 Tyrw. 411).

spond with the introductory statement*.

part of the money received as the plaintiff's servant for and on account of the plaintiff, on the sale of tan, and for which he was accountable.

The Court held, that the facts being stated in the innuendo, without any previous introductory allegation, and shewing embezzlement rather than robbery, the count was bad; and that the special damage being laid as the result of the speaking all the words in the several counts, some of which were good, a general verdict could not be supported; and a venire de novo was awarded.

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2. *Pleas* †.

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3. *Evidence.*

CANNELL *v.* CURTIS, M. T. 1835. C. P. 2 *Bing. N. S.* 228; S. C. 2 *Scott*, 372.

In action by assistant overseer, it suffices to shew he acted as such, and to produce

IN an action for a libel—

The Court held, that, to sustain an averment in a declaration for a libel, that the plaintiff was appointed assistant overseer, it is not necessary to prove that he was elected by the inhabitants in the parish in the vestry assembled, according to 59 Geo. 3, c. 12, s. 7,

* And should not be too large; if too large it will be bad. (*Alexander* v. *Angle*, M. T. 1830, Ex., 1 C. & J. 143; S. C. 1 Tyrw. 9; S. C. 7 Bing. 149). If words spoken be not strictly in connection with the trade, and no special damage be proved, the innuendo must connect them with the trade. (*Sibley* v. *Tomlins*, H. T. 1834, Ex., 4 Tyrw. 90). And declaration in slander on a physician as such, must shew how the words refer to special character. (*Ayre* v. *Craven*, M. T. 1834, K. B., 4 N. & M. 220; S. C. 2 Ad. & E. 2). That "plaintiff has made £—— in my service, whether honestly or otherwise," the innuendo may be that the defendant conducted himself dishonestly. (*Clegg* v. *Laffer*, E. T. 1834, K. B., 10 Bing. 250; S. C. 3 M. & Scott, 727). But words plainly imputing crime require no innuendo. (*Tomlinson* v. *Brittlebank*, E. T. 1833, K.B., 1 N. & M. 455). In slander, where the jury have found that the defendant meant to impute to the plaintiff an offence punishable by law, the declaration will be good after verdict, even though the colloquium be rejected. (*Francis* v. *Roose*, H. T. 1838, Ex., 3 M. & W. 191).

† By Reg. Gen., H. T. 4 Will. 4, in an action of slander of the plaintiff in his profession or trade, the plea of not guilty will operate to the same extent precisely as before the Rule in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. In actions for words not actionable in themselves, evidence of their truth may be given under the general issue to disprove malice. The attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title if he bonâ fide, though without authority, makes such objections to the seller's title as his principal would have been authorized in making. (*Watson* v. *Reynolds*, M. T. 1826, N. P., 1 M. & M. 1). Plea of justification must admit that the words were spoken in the unqualified sense alleged in the declaration. (*M'Pherson* v. *Daniels*, M. T. 1829, K. B., 10 B. & C. 263). To an action of slander, imputing insolvency to plaintiff, the defendant pleaded that J. N., having occasion in the way of his trade and business to inquire into the solvency and state of affairs of the plaintiff, sent one W.W. to the defendant for that purpose, and that defendant then spoke the words in the declaration, believing them to be true:—Held bad on special demurrer, as it did not state the words to be spoken without malice, or at least bonâ fide. (*Smith* v. *Thomas*, M. T. 1835, C. P., 2 Bing. N. S. 372; S. C. 2 Scott, 543; S. C. 4 D. P. C. 333).

and that three days' notice of the holding of such vestry was given, pursuant to the 58 Geo. 3, c. 69, s. 1; but the production of a warrant of appointment, under the hands and seals of two justices, and proof that the plaintiff acted as assistant overseer, is sufficient primâ facie evidence that he was legally appointed. the appointment by justices*.

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4. *Costs*†. See, also, 3 & 4 Vict. c. 24, and 4 & 5 Vict. c. 28, ante, Vol. 2, p. 213.

* If affirmative pleas are pleaded with the general issue, the plaintiff may, if he chooses, give in evidence any matter that goes to destroy the justification so pleaded, by way of anticipating the defence, or he may content himself with proving the facts alleged in the declaration, and let the defendant make out what he can in justification, and trust to answering it by evidence in reply; but if he does this, he will be restricted to such evidence as goes exactly to answer the case attempted to be made out by the defendant in support of his pleas. (*Pierrepoint* v. *Shapland*, 1825, N. P., 1 C. & P. 447). In an action for slander, the plaintiff may give evidence of anything that the defendant afterwards said, that goes to shew malice in the defendant, provided that it cannot be the subject of another action; therefore, the plaintiff may give evidence that the defendant repeated the same words at a subsequent time, or spoke on the subject of this action, but cannot go into evidence of other words subsequently spoken if those words may be the subject of another action. (*Defries* v. *Davis*, E. T. 1835, N. P., 7 C. & P. 112). On the trial of an action of slander the plaintiff may go into evidence to shew that he had recovered in a previous action for slander against the defendant's son, and that after the trial of that action he sent to the defendant's attorney to compromise the present action. An allegation of slander, as to the cleanliness of the plaintiff's person (a cook) as of the defendant's actual knowledge:—Held, not supported by proof of the words as to the defendant's belief or understanding only. (*Cook* v. *Stokes*, M. T. 1834, N. P., 1 M. & Rob. 237). Words alleged to have been spoken of A., in reference to two offices held by him, must be proved to apply to both offices. (*Sellen* v. *Tell*, M. T. 1825, K. B., 4 B. & C. 655; S. C. 7 D. & R. 721). The omitting to prove words alleged to have been used at the same time, but not varying or modifying the slanderous expressions, is no variance. (*Orpwood* v. *Barkes*, M. T. 1826, C. P., 4 Bing. 261). The criminality of the offence charged will not be presumed. (*Sweetapple* v. *Jesse*, T. T. 1833, K. B., 2 N. & M. 36; S. C. 5 B. & Ad. 27). And under the words "plaintiff was not entitled to practise as a physician," plaintiff must shew he was. (*Collins* v. *Carnegie*, T. T. 1834, K. B., 3 N. & M. 703; S. C. 1 Ad. & E. 695).

Where the special damage alleged in the declaration was, that certain persons, (naming them), who would otherwise have employed &c., declined, and refused to do so:—Held, that it was not supported by evidence that they would have recommended him to such persons, and that, if the plaintiff had been recommended, such persons would have employed him; the not employing being not on account of the slander, but of the non-recommendation. (*Sterry* v. *Forenoon*, H. T. 1827, N. P., 2 C. & P. 592). To support a claim for special damage arising from loss of customers, statements made by them is not admissible; they must be called to state there reasons for discontinuing. (*Tilk* v. *Parsons*, M. T. 1825, N. P., 2 C. & P. 201). As to special damage, the motives of a witness cannot be taken into consideration. (*Knight* v. *Gibbs*, E. T. 1834, K. B., 3 N. & M. 467; S. C. 1 Ad. & E. 43). Where felony is imputed the plaintiff cannot go into evidence of general character for honesty, although a justification is pleaded. (*Cornwall* v. *Richardson*, M. T. 1825, N. P., 1 R. & M. 305; S. C. 1 C. & Y. 106).

Where words doubtful as to intent, the proper question for the jury is, whether uttered merely in way of honest advice, and if so, whether in so doing defendant was guilty of any malice in fact. (*Bromage* v. *Prosser*, E. T. 1825, K. B., 4 B. & C. 247; S. C. 1 C. & P. 475). Malice must be shewn; and what is malice, and whether the words impute felony, are questions for the jury. (*Kine* v. *Sewell*, H. T. 1838, Ex., 3 M. & W. 297). If slight evidence of malice it will be left to the jury. (*Kelly* v. *Partington*, P. T. 1834, K. B., 4 B. & Ad. 700).

† In an action for slander of the plaintiff in his profession, and pleas of not guilty and a justification, the verdict passed for the defendant on the first issue, on the ground of the words spoken being a confidential communication, and for

5. *Demurrer**.

6. *Amendment*†.

(*c*) Inquiry, writ of.

Tripp *v.* Thomas, M. T. 1824. K. B. 3 *B. & C.* 427; S. C. 5 *D. & R.* 276; S. C. 1 *C. & P.* 477.

Jury may give substantial damages, though no evidence laid before them other than the admissions on the record.

An attorney brought an action for defamation. The defendant suffered judgment by default. At the execution of the writ of inquiry counsel attended for both parties, but no evidence was given. The jury gave a verdict for 40*l.*

The Court would not set aside the inquiry on the ground of excessive damages.

(*d*) Staying proceedings‡.

(*e*) Interference of the court after verdict.

Symons *v.* Blake, T. T. 1835. Ex. 2 *C., M. & R.* 416; S. C. 1 *D. P. C.* 263.

The Court will not interfere after verdict for plaintiff, on ground that he has since been convicted of the offence charged.

In an action of slander, a verdict had been found with damages in an action of defamation for words imputing felony—

The Court would not stay the verdict or grant a new trial, on the ground, that since the trial the plaintiff has been convicted and attainted of the same felony; à fortiori where the defendant has been examined as a witness upon the trial of the indictment.

the plaintiff without damages on the second, in support of which no evidence at all was given, the Judge did not certify under the stat. 4 Ann. c. 16:—Held, that the plaintiff was entitled to have his costs taxed on the second issue, upon which he had a verdict, the stat. 21 Jac. 1, c. 16, s. 6, not applying to the case. (*Skinner* v. *Shoppee*, M. T. 1839, C. P., 6 Bing. 131). A Judge has no power to give costs in a case of slander; where the plaintiff had recovered only 20*s.*, and the Judge having certified to give the full costs, the Court ordered the taxation to be reviewed and the costs reduced to 20*s.* (*Goodall* v. *Ensall*, E. T. 1835, Ex., 3 D. P. C. 743).

If the plaintiff remits the damages on some counts he is not entitled to the costs on them. (*Dadd* v. *Crease*, M. T. 1833, Ex., 2 C. & M. 223; S. C. 2 D. P. C. 269; S. C. 4 Tyrw. 74). So, in an action for slanderous words, which are actionable only because spoken of and concerning the plaintiff in the way of his business, less than 40*s.* being recovered, the plaintiff is only entitled to the same amount of costs as damages under the 21 Jac. 1, c. 16, s. 6. (*Grenfel* v. *Pierson*, E. T. 1832, B. C., 1 D. P. C. 406).

In an action of slander, in which no justification was pleaded and no special damage was alleged, the plaintiff having recovered a verdict, the prothonotary allowed for the expense of witnesses necessary to prove an inducement explanatory of the slander and his professional reputation:—And held, that he had exercised a proper discretion in making such allowance. (*Andrews* v. *Thompson*, E. T. 1832, C. P., 8 Bing. 431).

* A general demurrer does not admit the intent attributed to the words in the innuendo. (*Wheeler* v. *Haynes*, M. T. 1838, Q. B., 1 P. & D. 55).

† The Lord Chief Justice refused at the trial to allow an amendment, by striking out several innuendoes admitted to have no reference to the plaintiff. (*Prudhomme* v. *Fraser*, M. T. 1834, N. P., 1 M. & Rob. 435; S. C. 2 Ad. & E. 645).

‡ A rule to stay on payment of costs, &c. will be enforced if not performed. (*Tardrew* v. *Brook*, T.T. 1834, K. B., 5 B. & Ad. 880; contra *Fricker* v. *Eastman*, 11 East, 319). If an agreement to stay on payment of costs and an apology be not carried into effect, judgment may be signed for want of a plea. (*Yardrew* v. *Brook*, M. T. 1833, K. B., 2 N. & M. 835).

(*f*) NEW TRIAL*. See, also, tit. *New Trial.*

(*g*) ARREST OF JUDGMENT†.

Smuggling‡.

Sodomy§.

Solbit ad Diem. See tit. *Bond.*

Solbit post Diem. See tit. *Bond.*

* Where, on the execution of a writ of inquiry, in an action for slander, the jury are incorrectly informed by the under-sheriff that any amount of damages will carry costs, and they find for less than 40*s.*, that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. (*Grater* v. *Collard*, E. T. 1838, B. C., 6 D. P. C. 503). So, in an action for slander, after a verdict for the plaintiff with 100*l.* damages, the Court refused to allow the defendant to have a new trial, and to be allowed to plead the truth of the words upon any terms, though it was alleged that there was ample evidence to support a justification, and the general issue only was pleaded through the mistake of the pleader. (*Kirby* v. *Simpson*, E. T. 1835, Ex., 3 D. P. C. 791).

† The record in an action for slander stated, that the writ issued on the 4th of June, and that the words were spoken on the 27th:—Held, that this discrepancy on the record was no ground for arresting the judgment. (*Steward* v. *Layton*, H. T. 1835, Ex., 3 D. P. C. 430).

‡ The 6 Geo. 4, c. 108, regulates the law with respect to smuggling, and the 4 Will. 4, c. 63, alters the punishment.

Semble, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of 6 Geo. 4, c. 108, s. 56. (*Rex* v. *Noakes*, 1832, O. B., 5 C. & P. 326).

On an indictment under 6 Geo. 4, c. 108, for making lights, &c., the offence being laid on the 9th of March:—Held, that it was no ground for arresting the judgment, that the indictment did not distinctly aver in the words of the act that the offence was committed between the 21st September and 1st April; and that even before verdict the Court was bound to take judicial notice that the day averred in the indictment was in fact within the period mentioned in the statute. (*Rex* v. *Brown*, 1828, N. P., 1 M. & M. 163).

§ A party may be rightly convicted by jury finding penetration but no emission. (*Rex* v. *Reekspear*, 1832, 1 Moody, C. C. 342). On an indictment against a prisoner, charging him with the capital offence of bestiality, the jury cannot find him guilty of an assault under the 7 Will. 4 & 1 Vict. c. 85, s. 11; but if they acquit him of the capital charge, he may be detained in custody, and indicted for a misdemeanor in attempting to commit a felony. (*Rex* v. *Eaton*, 1838, C. C. C., 8 C. & P. 417). Quære, whether on a charge of attempting to commit an unnatural offence, if the prisoner be acquitted of the capital charge, he can be convicted of an assault, the other consenting. (*Reg.* v. *Pikesley*, 1839, C. C. C., 9 C. & P. 124).

Son Assault Demesne. See tit. *Assault and Battery.*

Southwark. See *Requests, Court of.*

Special Case*.

Special Jury. See tit. *Jury.*

Spirituous Liquors†.

* By Reg. Gen., H. T. 4 Will. 4, "All special cases, and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of 1*s.*, and notice thereof shall be given forthwith by such party to the opposite party."

The 3 & 4 Will. 4, c. 42, s. 25, gives power to state a special case without proceeding to trial.

The Court cannot convert a special case into a special verdict, unless by consent, (*Attorney-General* v. *Dimond*, H. T. 1831, Ex., 1 Cr. & J. 356; S. C. 1 Tyrw. 243), unless there is a power expressly reserved for that purpose. (*Archbishop of Canterbury* v. *Robertson*, T. T. 1833, Ex., 2 D. P. C. 78). Where a special case, on which judgment had been given for the plaintiff in this Court, was, at the instance of the defendant, turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this Court, after the lapse of two years, refused to allow the plaintiffs the costs occasioned thereby. (*Collins* v. *Gwinne*, T. T. 1835, C. P., 2 Scott, 332; S. C. 4 D. P. C. 122).

Where the Vice-Chancellor directed the opinion of the Court to be taken on a special case, the Court would not permit it to be entered for argument with the signature of a Master in Chancery, who had settled it, instead of the signature of counsel; but this Court will not compel an attorney to lay the case before counsel for the purpose of signature. (*Roy* v. *Champneys*, M. T. 1834, C. P., 3 D. P. C. 105). And where a verdict was found, subject to a special case, to be agreed on between the parties, but it was not set down for argument until after the death of one of them against whom judgment was ultimately given, the Court refused to allow judgment to be entered nunc pro tunc at the instance of the successful party, as the delay in setting down the special case could not be considered as that of the Court. (*Doe* d. *Taylor* v. *Crisp*, E. T. 1839, B. C., 7 D. P. C. 584).

Where a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin and have the reply. (*Dippins* v. *Marquis of Anglesea*, E. T. 1834, Ex., 2 D. P. C. 647).

It is no ground of objection to a judgment, that the plaintiff, having it pronounced entirely in his favour, has entered it up, partly for himself, and partly for the defendant. (*Harnidye* v. *Wilson*, E. T. 1840, B. C., 8 D. P. C. 417).

Where, after verdict for the plaintiff, subject to a special case, one of the defendant's pleas is held bad, he is not entitled to the costs of witness in support of that plea. (*Cartwright* v. *Cook*, H. T. 1833, B. C., 1 D. P. C. 529).

† The mere omission to comply with excise regulations, to which a particular penalty is annexed, will not render the sale of goods (subject to those regu-

Spring Guns*.

Stabbing†. See, also, tits. *Manslaughter—Murder.*

Stage Coach‡, regulations as to, 7 Geo. 4, c. 33, 2 & 3 Vict. c. 47, 5 & 6 Vict. c. 79.

Stakeholder§. See tits. *Interpleader Act—Money had and received—Vendor and Purchaser—Wager.*

lations) void; therefore, where the permit mis-stated the strength of spirits sold, (it being required by the stat. 6 Geo. 4, c. 80, s. 117, that the permit accompanying any spirits should express the true strength thereof), the plaintiff was held entitled to recover notwithstanding. The 124th section of the 6 Geo. 4, c. 80, does not apply to rectifiers of spirits. (*Wetherall* v. *Jones*, H. T. 1832, K. B., 3 B. & Ad. 221). If a person sell two sorts of spirits at the same time to an amount above 20*s.*, he may recover the price, although the amount of each species of spirits be under 20*s.* (*Owens* v. *Porter*, 1830, N. P., 4 C. & P. 367).

* Even before the 7 & 8 Geo. 4 setting spring guns in the day-time in a walled garden, without notice, was actionable; (*Bird* v. *Holbrook*, E. T. 1828, C. P., 4 Bing. 628); and the 7 Geo. 4, c. 18, prohibits the use of spring guns, &c., except in dwelling-houses.

† A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—Held, that, on trial of the indictment for stabbing B., both C. and the surgeon might be asked as to what kind of wound C. received, with a view of identifying the instrument used. (*Rex* v. *Fursey*, T. T. 1833, N. P., 6 C. & P. 81).

‡ The 9 Ann. c. 33, s. 4, inflicts a penalty on any person who shall drive or let to hire any hackney-coach or coach-horses in the cities of London or Westminster without a license from the commissioners of hackney-coaches. The 1 Geo. 1, c. 57, s. 1, inflicts a penalty on any person who shall drive for hire in the same cities with any coach whatsoever, hearse, or coach-horses, except such person be licensed by the commissioners of hackney-coaches:—Held, that a conviction was insufficient which charged the party with driving and letting to hire in the said cities a certain coach and two coach-horses, and also with driving for hire a certain coach with two coach-horses, and conveying a person in the said coach for hire. (*Cloud* v. *Turfery*, M. T. 1824, C. P., 2 Bing. 318).

The stats. 3 Car. 1, c. 1, and 29 Car. 2, c. 7, do not make it illegal for stage coaches to travel on the Lord's Day. (*Sandiman* v. *Breach*, T. T. 1827, K. B., 7 B. & C. 96).

§ Where a cheque was deposited by the plaintiff with the defendant, to be handed over to a third party on the success of an experiment in work to be done by him, if not done, to be returned to the plaintiff, and the defendant obtained cash for the cheque; on the failure of the condition, but which was not communicated to the defendant, the plaintiff brought an action as for money had and received to his use:—Held, that, until such communication, no right of action accrued, and the defendant, by changing the cheque into money, did not become a wrong-doer so as to lose the character of stakeholder. (*Wilkinson* v. *Godefroy*, H. T. 1839, Q. B., 9 Ad. & E. 536).

Stamps.

See, also, particular titles, according to the subject-matter.

I. RELATIVE TO THE INSTRUMENTS WHICH ARE OR ARE NOT SUBJECT TO A DUTY.

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(*b*) Acknowledgments, p. 459.
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I. RELATIVE TO THE INSTRUMENTS WHICH ARE OR ARE NOT SUBJECT TO A DUTY.

(*a*) Accounts*.

(*b*) Acknowledgments.

Mullett *v.* Hutchison, H. T. 1828. K. B. *7 B. & C.* 639; S. C. 1 *M. & R.* 522.

An acknowledgment that bills are left in a party's hands to get discounted requires no stamp†.

An acknowledgment in these words:—"I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand"—

The Court held to require no stamp, because it did not bind the party to get the bills discounted, and the law would compel him to return them on demand.

(*c*) Administration, &c. See also tit. *Administration*‡.

* Accounts need not be stamped. (*Hawkins* v. *Warre*, H. T. 1825, K. B., 3 B. & C. 690; S. C. 5 D. & R. 512).

† And an acknowledgment by an attorney, that he had received a bill to recover the amount, or effect some arrangement, need not be stamped. (*Langdon* v. *Wilson*, E. T. 1828, K. B., 2 M. & R. 10). And an instrument, intitled *John Doe* d. *J. B.* v. *Roe*, recited that judgment had been signed against the casual ejector, and that the undersigned being tenant of the premises admitted that the writ of possession had been stayed, and that J. B. had died, having devised the premises unto T.; and thereby, in consideration of the premises, he (the undersigned) attorned tenant to T. for the premises in his possession, and acknowledged to have paid 1*s.* upon that attornment to the agent of T. on account, and in part of the rent due and to become due in respect of the said premises, concluding thus,—"and I become tenant thereof to the said T. from the 29th of September last past. W. S.:"—Held to be an attornment only, and not to require any stamp. (*Doe* v. *Smith*, E. T. 1838, Q. B., 3 N. & P. 335).

‡ Where an administrator was compelled to pay an annuity which his intestate had granted, and in respect of which the defendant had covenanted to indemnify him:—Held, that such a merely contingent covenant, or the damages to be recovered, could not be a matter of valuation, or be treated as part of the intestate's estate, so as to be taken into account in the amount of the stamp, on the letters of administration. (*Carr* v. *Roberts*, 1830, N. P., 2 M. & M. 45).

(*d*) Agreements.

Doe *d.* Frankis *v.* Frankis, E. T. 1840. Q. B. 11 *Ad. & E.* 792; S. C. 3 *P. & D.* 565.

An agreement merely stating how rent is to be paid requires a stamp*.

By an instrument in the terms:—"A memorandum of attornment," defendant acknowledged to have held the estate called, &c., as tenant to J. F., at a yearly rent of 60*l.*, from &c., the rent to be paid quarterly; and he further acknowledged to owe J. F. 60*l.* for the first year's rent, due on the 4th then instant; and he had, on the signing thereof, paid the attorney of J. F. 6*d.* in part of the rent so due to him as aforesaid; and the instrument was signed, &c.

The Court held, that setting out the manner in which the rent prospectively was to be paid, it was to be deemed an agreement, and to require a stamp.

Linley *v.* Clarkson, H. T. 1833. Ex. 1 *C. & M.* 436.

All words must be included in calculation, even when only to be used to ascertain a collateral fact.

In an agreement "to pay rateably and proportionably, according to the sums of money severally subscribed by us, and set opposite to our respective names"—

The Court held, that all the sums and signatures must be reckoned in the number of words; and where such an agreement was executed by the defendant, and nearly two hundred other persons, and the number of words, inclusive of the sums and signatures down to and including the defendants, did not amount to 1080, but, including all the sums and signatures, exceeded that number, that a 1*l.* stamp was insufficient.

Hick *v.* Hodgson, H. T. 1827. C. P. 12 *Moore*, 213.

Fixtures are not goods within the exception†.

In an action for the price of fixtures by the plaintiff, the out-going, against the defendant, the in-coming tenant, the agreement was made through the agency of a broker, who gave to the defendant a me-

* Where time had been given to the acceptor, by taking a warrant of attorney:—Held, that a paper containing a consent to the indorsee's using any means to enforce payment by the acceptor, without prejudice to his right to recover against the drawer, might be read without a stamp. (*Hill* v. *Johnson*, M. T. 1828, N. P., 3 C. & P. 456). Where the defence to an action on a note for money lent was, that the loan was usurious:—Held, that a memorandum of agreement as to the terms might be given in evidence without a stamp, for the purpose of proving usury. (*Nash* v. *Duncomb*, 1831, N. P., 2 M. & M. 104).

A broker's note of the purchase of shares need not be stamped. (*Tomkins* v. *Savory*, T. T. 1829, K. B., 9 B. & C. 705). Where the agreement referred to an inventory as "hereunto annexed:"—Held, that it was to be taken as part thereof in reference to the stamp, although it had been affixed subsequently, and was stamped as an inventory. (*Veal* v. *Nicholls*, H. T. 1833, N. P., 1 M. & Rob. 248).

An instrument, purporting to be an absolute conveyance, but stamped as an agreement only, may be received as evidence of an agreement not to disturb the party in possession. (*Rex* v. *Inhabitants of Ridgwell*, E. T. 1827, K. B., 6 B. & C. 665).

† But an agreement to make a press, without any contract as to fixing it, is a memorandum relating to goods, and exempt. (*Pinner* v. *Arnold*, M. T. 1835, Ex., 2 C., M. & R. 613; S. C. 1 Tyrw. & G. 1). An agreement for a sale of goods and goodwill is not a sale merely of goods within the exemption of the Stamp Act, and held to require a stamp. (*South* v. *Finch*, H. T. 1837, C. P., 3 Bing. N. S. 506; S. C. 4 Scott, 393). But an agreement virtually for sale of a

morandum acknowledging the receipt of 3*l.* for letting the premises, and that he was to take the fixtures at a valuation, if accepted as tenant, but if not the 3*l.* to be returned.

The Court held, that fixtures, not being goods within the exception of the Stamp Act, it was a contract relative to the sale of an interest in the house, and was not receivable in evidence without a stamp.

(*e*) Appointments to offices.

Rex *v.* Inhabitants of Lew, M. T. 1828. K. B. 8 *B. & C.* 655.

On a question of settlement—

Appointment of assistant overseers must be stamped.

The Court held, that the appointment of an assistant-overseer, under the stat. 59 Geo. 3, c. 12, at an annual salary, under the hands and seals of the justices, to such an office, with an annual salary annexed to it, requires a 2*l.* stamp.

(*f*) Assignment of debts.

Pooley *v.* Goodwin, M. T. 1835. K. B. 5 *N. & M.* 466.

Assignment of debt should be stamped according to amount actually received.

A party entitled to receive commission as architect of works in progress, assigned it in trust to pay a debt, with a power to receive it, and a covenant to pay the debt, and not receive the commission, or do any act whereby the party might be hindered receiving it.

The Court held this to operate as an absolute conveyance of the commission, and not as a mortgage, and that a stamp calculated upon the amount of commission eventually received was sufficient.

(*g*) Authority to agents*.

ship, though containing other matters, need not be stamped. (*Meering* v. *Duke*, E. T. 1828, K. B., 2 M. & R. 121). An agreement to supply a house and buildings with water by means of pipes to be laid down in a certain manner, and to a certain height, is an agreement relating to the sale of goods, and need not be stamped. (*West Middlesex Water Works Company* v. *Suwerkropp*, M. T. 1829, N. P., 1 M. & M. 408; S. C. 4 C. & P. 87). If a sheriff, under a fi. fa., levy on goods worth 14*l.*, and sheriff be sued, and the execution-creditor give the sheriff an agreement of indemnity, this agreement requires a stamp, unless the indemnity be limited to a sum under 20*l.* (*Shepherd* v. *Wheble*, 1838, N. P., 8 C. & P. 534). Where separate lots are purchased, each under 20*l.*, a memorandum, according to conditions of sale, is to be taken as separate contract for each. (*Roots* v. *Lord Dormer*, M. T. 1834, K. B., 4 B. & Ad. 77). "Memorandum of an agreement between W. S. and W. B., which is:—The horse to be 34*l.*; W. B. to have half at 17*l.*, and to pay half the horse's expenses being with J. M. from his arriving at M. At the same time agreed for the horse to go to M. to be entered for the handicap and silver cup:"—Held to be an agreement relating to the sale of goods, wares, and merchandize, and not to require a stamp. (*Marson* v. *Short*, T. T. 1835, C. P., 2 Bing. N. S. 118). And a contract between in-coming and out-going tenant for stock, &c., treated as an agreement for goods. (*Stone* v. *Rogers*, E. T. 1837, Ex., 2 M. & W. 443). However, a letter, containing the terms on which a ship's register was deposited, must be stamped. (*Bowen* v. *Fox*, E. T. 1828, K. B., 2 M. & R. 167).

* Where, under a local act, a proxy to vote may be appointed by writing, the writing must be stamped. (*Rex* v. *Kelk*, T. T. 1840, Q. B., 1 P. & D. 185).

(*h*) Attornment, as to*. See also ante, p. 459, n.

(*i*) Bonds†.

(*j*) Feoffments‡.

(*k*) Indemnity.

Wrigley *v.* Smith, H. T. 1834. K. B. 3 *N.* & *M.* 181.

If an indemnity be above 20*l.* it must be stamped§.

On an agreement to indemnify A. from all costs, charges, damages, or other expenses which he may incur as bail for B.—

The Court held, that it required an agreement stamp, under 55 Geo. 3, c. 184, if the liability of A. were for more than 20*l.*, though the costs, &c. incurred, did not amount to that sum.

(*l*) Leases and agreements for.

Blount *v.* Pearman, M. T. 1834. C. P. 1 *Bing. N. S.* 408; S. C. 1 *Scott*, 55.

Although two farms be de-

The lease demised two separate farms, at different habendums, and distinct rents, with covenants applicable to each.

* E., claiming title to land, enters, and obtains from the tenants in possession payment of 1*s.* each, and their signatures to the following instrument:—"We hereby severally attorn and become tenants and under-tenants to E., from Old Michaelmas then past, of and for such parts of the estate as now are in our respective occupations, at and under the several yearly rents now payable by us, and under which we now have and occupy the same." This instrument was signed by F., and also by G. as under-tenant to F., F. and G. being respectively in the occupation of parts of the premises. Afterwards, E. remains out of possession thirty years, without exercising any further act of ownership, and without any further acquiescence in, or recognition of, his title:—Held, that the instrument so signed was a mere attornment, and did not require a stamp. (*Doe* d. *Linsey* v. *Edwards*, T. T. 1836, K. B., 6 N. & M. 633).

† A bond conditioned for the payment of a sum of money to the obligee on a day named, according to a proviso contained in a mortgage of copyhold lands by a third person, to receive the same amount, was held to require a 1*l.* stamp, though it bore no stamp denoting that the ad valorem duty had been paid on the mortgage deed, and that was not produced. (*Quin* v. *King*, H. T. 1836, Ex., 1 M. & W. 42; S. C. 1 Tyrw. & G. 407). A bond was conditioned for the payment on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent.:—Held, that a stamp, covering the amount of the principal, was sufficient. (*Dixon* v. *Robinson*, T. T. 1831, N. P., 2 M. & M. 115; S. C. 5 C. & P. 96). A bond, with penalty conditioned not to set up trade, and for a salary, only requires a deed-stamp. (*Mounsey* v. *Stephenson*, M. T. 1827, K. B., 7 B. & C. 403).

‡ A feoffment in consideration of natural affection, and also of 10*s.*, does not, under 55 Geo. 3, c. 184, require two separate stamps of 1*l.* 15*s.* each. (*Doe* d. *Wheeler* v. *Wheeler*, M. T. 1834, K. B., 4 N. & M. 10; S. C. 2 Ad. & E. 28).

§ Where a bond was to secure to creditors a composition on the amount of their debts, and contained also an indemnity by one of the sureties for the composition to his co-surety:—Held, first, that the stamp of 1*l.* 15*s.* was sufficient, without requiring an ad valorem stamp on the amount of the debts; secondly, that the distinct provision for indemnifying one of the sureties did not render a second stamp necessary. (*Annandale* v. *Pattison*, T. T. 1829, K. B., 9 B. & C. 919).

The Court held, that being nevertheless one transaction, and an entire contract, one stamp ad valorem of both rents was sufficient.

mised, one stamp sufficient*.

(*m*) Mortgages.

Doe *d.* Barnes *v.* Rowe, T. T. 1838. C. P. 4 *Bing. N. S.* 737; S. C. 6 *Scott*, 525.

A mortgage was transferred upon a further advance—

The Court held, that an ad valorem stamp upon such advance was sufficient, without the addition of any deed stamp.

When a mortgage is transferred upon a further advance, an ad valorem stamp upon such advance sufficient†.

* The counterpart of a lease must be stamped as a deed. (*Baker* v. *Gostling*, M. T. 1834, C. P., 1 Bing. N. S. 246; S. C. 1 Scott, 58). But a lease in 1824, demising certain premises at a yearly rent of 20*l.*, and also certain other fields, from a subsequent period, at the rents then paid by the tenants who then actually occupied them:—Held sufficiently stamped with a 3*l.* ad valorem stamp, and not to require an additional stamp of 1*l.* 15*s.* in respect of those fields. (*Parry* v. *Deere*, M. T. 1836, K. B., 1 N. & P. 47). When the extent of interest is not shewn, or the time for the commencement or termination of the term stated, the document must be taken as an agreement for a lease. (*Clayton* v. *Burtenshaw*, H. T. 1826, K. B., 5 B. & C. 41). Where a dairy was let by agreement, not under seal, the instrument containing words of demise of specified land therewith, found by the sessions to be of the value of 10*l.*, and the rent paid:—Held, that it was not void as containing a demise of incorporeal hereditaments, not under seal, and that the instrument demising several matters at one fixed rent, it was properly stamped with an ad valorem stamp. (*Reg.* v. *Hockworthy*, T. T. 1837, K. B., 2 N. & P. 383).

Where the defendant had, upon a treaty for a lease, got into possession, but the lease had never been prepared, the defendant saying he should dispute the lessor's title:—Held, that the draft lease, signed by the plaintiff and defendant, "We approve of the written draft," did not import an agreement to require a stamp. (*Doe* d. *Lambourn* v. *Pedgriph*, 1830, N. P., 4 C. & P. 312).

The defendant became the purchaser at an auction of a lot, described as "the herbage of Upper Townshend's Close, Lower Townshend's Close, and the Priory," at the price of 45*l.*; by the conditions of sale it was agreed that a deposit of ten per cent. should be paid, and a bill given for the residue, and that the purchaser should be entitled to possession of the lot until the 29th September. The contract of purchase at the foot of the conditions, signed by the defendant, was stamped with a 1*l.* stamp:—Held, that this was a lease of hereditaments granted in consideration of a sum of money, by way of premium, under 50*l.*, without any yearly rent, and therefore properly stamped with a 1*l.* stamp. (*Cattle* v. *Gamble*, M. T. 1838, C. P., 5 Bing. N. S. 46; S. C. 6 Scott, 733; S. C. 7 D. P. C. 98).

† So, an assignment of a mortgage as a mere transfer of an old security for money previously due:—Held sufficiently stamped with a 35*s.* stamp, although the seisin of the mortgagor not proved. (*Doe* d. *Brame* v. *Maple*, T. T. 1837, C. P., 3 Bing. N. S. 832). A mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble requires only a stamp of such an amount as will cover the principal sum; semble. (*Paddon* v. *Bartlett*, M. T. 1834, K. B., 4 N. & M. 1; S. C. 2 Ad. & E. 9). Where a deed is made as an additional or further security for a sum already advanced, and also as a security for a further sum, although the ad valorem duty is only payable on the latter sum, according to 55 Geo. 3, c. 184, (sched. Mortgage, Exemptions), yet there must be a deed stamp. (*Lant* v. *Pearce*, E. T. 1838, Q. B., 3 N. & P. 329). An assignment of leasehold, determinable on lives by way of mortgage, with a covenant to pay a certain sum with interest, and also the yearly premium and other costs and charges of an assurance of one of the lives for the term of seven years, requires a stamp of 25*l.*, as being a deed to secure a sum without limit. The term "without limit" in the 55 Geo. 3, c. 184, (schedule, Mortgage), means without limit on the face of the deed. (*Halse* v. *Peters*, M. T. 1831, K. B., 2 B. & Ad. 807; see 4 B. & Ad. 204).

In a mortgage deed securing the sum lent, with interest, and all sums which the mortgagee should expend in respect of the deed, and interest thereon, with a

(*n*) Natural love and affection, conveyance in consideration of.

Denn *d.* Manifold *v.* Diamond, E. T. 1825. K. B. 4 *B. & C.* 243.

A conveyance in consideration of natural love and affection does not require an ad valorem stamp.

A father seised in fee of an estate, conveyed it to his son by a deed, which recited that he (the father) was minded, and had resolved to give and assure it to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1500*l.* in augmentation of the portions or fortunes of his sisters.

The Court held, that this was not a sale to the son within the meaning of the 43 Geo. 3, c. 149, (schedule, tit. Conveyance) and that the conveyance was not subject to the ad valorem stamp duty.

(*o*) I. o. u*.

(*p*) Order for payment of money.

Parker *v.* Dubois, H. T. 1836. Ex. 1 *M. & W.* 30; S. C. 1 *Tyrw. & G.* 243.

Letters, containing merely directions for the payment of money, need not be stamped†.

A party holding certain mining shares, which were the property of another, wrote to inform him that a call had been made upon them, and to know whether he should pay the call to prevent their being forfeited. The owner returned answer by letter, authorizing him to do so.

The Court held, that these letters did not require a stamp.

(*q*) Power of attorney.

Allen *v.* Morrison, M. T. 1828. K. B. 8 *B. & C.* 565.

A power of attorney, signed by members of a mutual insurance club, only requires one stamp.

Several persons, members of an insurance club, executed a power of attorney to underwrite policies of insurance on their account—

The Court held, that one stamp on the instrument was sufficient, although some of the members themselves insured with the club for their own ships.

power of sale, and direction for the mortgagee to stand possessed of the proceeds of sale, in trust, after deducting the mortgage money and interest, and all expenses and interest, for the mortgagor; with a covenant from the mortgagor to pay the mortgage money and interest; the stamp affixed on the deed was calculated upon the principal sum alone:—Held sufficient. (*Doe* d. *Scruton* v. *Snaith*, H. T. 1832, C. P., 8 Bing. 146; S. C., 1 M. & Scott, 230).

* "11th October, 1831. I. O. U. 20*l.*, to be paid on the 22nd instant. W. B.,"—requires a stamp, either as a promissory note, or as an agreement. (*Brooks* v. *Elkins*, M. T. 1836, Ex., 2 M. & W. 74).

† A conditional order to pay money, addressed to the party's own agent, does not require a stamp. (*Hutchinson* v. *Heyworth*, M. T. 1838, K. B., 1 P. & D. 266).

(*r*) PROPOSAL.

HAWKINS *v.* WARRE, H. T. 1825. K. B. 3 *B. & C.* 690; S. C. 5 *D. & R.* 512.—S. P. DRANT *v.* BROWN, H. T. 1825. K. B. 3 *B. & C.* 665; S. C. 5 *D. & R.* 582.

A mere proposal need not be stamped.

IN replevin, the defendant's steward proved that a lease had been executed by the defendant, but not by the plaintiff, the terms of which had been reduced into writing by the assent of both parties; and he stated that to be the final agreement between the parties. The plaintiff, in order to negative this statement, tendered in evidence another unstamped paper in the handwriting of the defendant's steward, the effect of which was to shew that it was subsequently proposed by him that the plaintiff was to hold at a rent different from that mentioned in the lease.

The Court held, that, as this paper was not signed by the parties, it did not amount to an agreement or minute of an agreement, but to a proposal only, and therefore, that it did not require a stamp, and was properly received in evidence.

(*s*) RECEIPT *.

(*t*) SHIP'S DOCUMENTS, RELATING TO †.

(*u*) SURRENDER.

WEDDALL *v.* CAPES, H. T. 1836. Ex. 1 *Tyrw. & G.* 430; S. C. 1 *M. & W.* 50.

An agreement to surrender, not amounting to an absolute surrender, suf-

AGREEMENT in writing by tenants in common of an estate and the tenant of the principal part thereof, that the estate should be put up to sale by auction, and if not all sold then what was not sold should, in the month of August, be parted between them. And it

* To require a stamp, the receipt must be that it is given in discharge of something formerly due. (*Tomkins* v. *Ashby*, E. T. 1827, K. B., 6 B. & C. 541). A paper, in the following form, signed by the party:—"Memorandum. 30th April, 1836. Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for. (Signed) J. T.,"—stamped with an agreement stamp, is receivable in evidence without a receipt stamp. (*Tebbutt* v. *Ambler*, M. T. 1839, N. P., 9 C. & P. 60). A receipt in the terms,—"of the sum £——, in full for what I have done for him":—Held not to be a receipt in full of all demands requiring a 10*s.* stamp. (*Law* v. *Gunby*, 1829, N. P., 4 C. & P. 149). Where the defendant having money of the plaintiff's wife in his hands, the latter gave a memorandum that he consented to take it in weekly payments, and to give a receipt in full upon the whole being paid:—Held, inadmissible without a stamp. (*Remon* v. *Hayward*, H. T. 1835, K. B., 2 Ad. & E. 666). A receipt indorsed on the back of a stamped deed may be separately read in evidence, though it be part of an indorsement requiring another stamp. (*Odye* v. *Cookney*, M.T. 1835, N. P., 1 M. & Rob. 517). It has been held, that an accountable receipt, given by the agent of a party, not a banker, employed in investing money of his customers in annuities, was not to be admissible in evidence without a stamp. (*Catt* v. *Howard*, 1820, N. P., 3 Stark. 3). An assignment by a retiring partner of his interest to continuing partners, on payment of £——, does not require an ad valorem stamp. (*Belcher* v. *Sikes*, H. T. 1827, K. B., 6 B. & C. 234).

† As to the transfer of ships, stamp on, see 6 Geo. 4, c. 41.

fices with a 20*s.* stamp.

was agreed, that, upon such sale and partition, the sum of 100*l.* should be paid by one of them to the plaintiff, who was the tenant, as a remuneration for his losses, upon his giving up possession of his farm at the next Christmas, reserving to himself his right to a following crop; and it was also agreed, that he was to keep the possession of a barn and a stable until the ensuing Candlemas.

The Court held, that this did not amount to an actual surrender by the tenant, and was properly stamped with an agreement stamp.

(*v*) VESTRY, RESOLUTIONS AT*.

II. RELATIVE TO THE AMOUNT OF DUTY†.

III. RELATIVE TO THE TIME OF STAMPING‡.

IV. RELATIVE TO SEVERAL STAMPS§.

* Where by a resolution in vestry that the plaintiff should be reimbursed sums which he had paid for church repairs out of the rents of certain church lands :—Held, that, if such consent amounted to a charge on the land, the entry was inadmissible in evidence for want of a stamp in an action against the churchwardens to recover the rents received. (*Wrench* v. *Lord*, E. T. 1837, C. P., 3 Bing. N. S. 672 ; S. C. 4 Scott, 381).

† A memorandum to pay particular sums by instalments, with interest, only requires a stamp applicable to the principal. (*Dearden* v. *Binns*, M. T. 1827, K. B., 1 M. & R. 130).

‡ If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence, and send the instrument to the Samp-office to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection, taking the stamp as it is, but if the instrument be sent away to the Stamp-office the Judge will not allow any argument as to the original stamp being proper. (*Beckwith* v. *Benner*, M. T. 1834, N. P., 6 C. & P. 681).

§ A deed conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds under the Stamp Act, 55 Geo. 3, c. 184, and one stamp is sufficient. (*Doe* d. *Hartwright* v. *Fereday*, T. T. 1840, Q. B., 4 P. & D. 287). Where, by an agreement, a number of persons bind themselves, that each will severally pay 50*l.* and one fourth of certain costs, and give a bond, bill, or note for his own proportion, such agreement requires only one stamp. (*Ramsbottom* v. *Davis*, H. T. 1839, Ex., 4 M. & W. 584 ; S. C. 7 D. P. C. 173). A deed, purporting to be a surrender of a lease, and made in consideration of 120*l.*, and of a new lease to be granted of the premises at an increased rent was stamped with a 1*l.* 15*s.* stamp :—Held, that it did not also require an agreement stamp, as the agreement for the new lease was part of the conveyance and incident thereto. (*Doe* d. *Phillips* v. *Phillips*, E. T. 1840, Q. B., 11 Ad. & E. 796 ; S. C. 3 P. & D. 603). Where one and the same sum of money was secured by mortgage-deed and by bond, which were executed at the same time, but did not bear the same date, the mortgage-deed being impressed with a stamp denoting the payment of the ad valorem duty, and the bond with a stamp of 1*l.* only, it was held that the bond was not properly stamped and therefore not receivable in evidence. (*Wood* v. *Norton*, T. T. 1829, K. B., 9 B. & C. 885). A memorandum, having a lease-stamp, by which A. agrees to let B. certain lands mentioned in an annexed abandoned lease from A. to C., upon the conditions, agreements, &c. contained in the same lease, and by which A. and B. bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease, and the annexed lease need not be stamped. (*Pearce* v. *Cheslyn*, M. T. 1835, K. B., 5 N. & M. 652).

V. RELATIVE TO INDORSEMENTS ON THE INSTRUMENT*.

VI. RELATIVE TO THE EFFECT OF ALTERATION, AND OF ONE AGREEMENT REFERRING TO ANOTHER†.

JONES *v.* JONES, T. T. 1833. Ex. 1 *C., M. & R.* 721; S. C. 3 *Tyrw.* 890.

Before acceptance of a deed it may be altered without a new stamp.

UPON the execution of a marriage settlement, after one party had executed, an alteration was made before acceptance of the deed by the party to take.

The Court held, that it must be considered to be only in fieri, and a fresh stamp not necessary.

VII. RELATIVE TO THE PLEA OF NO STAMP‡. See, also, tits. *Bills and Notes—Pleas.*

VIII. RELATIVE TO UNSTAMPED INSTRUMENTS BEING RECEIVED IN EVIDENCE, AND WHEN THE OBJECTION SHOULD BE TAKEN§.

* If parties enter into a written agreement which is duly stamped, and indorse terms on the back of it varying the original agreement, such new terms will not be admissible in evidence without a fresh stamp, and the indorsement of such terms must be considered as putting an end to the original agreement, and therefore plaintiff cannot recover upon either but must be nonsuited. (*Reed* v. *Deere*, 1827, N. P., 2 C. & P. 624). But, indorsement on deed of the names of parties and day of execution does not require additional stamp. (*Winder* v. *Fearon*, M. T. 1825, K. B., 4 B. & C. 663; S. C. 7 D. & R. 185).

† Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein:—Held, that the clause referred to could not be considered as annexed to the new agreement, so as to make an additional stamp necessary on the ground of the agreement with the clause containing more than 1080 words. (*Attwood* v. *Small*, M. T. 1827, K. B., 7 B. & C. 390; S. C. 1 M. & R. 246). An agreement had been entered into to take premises upon the same terms and conditions as were contained in a written agreement between plaintiff and a third person, which, upon being produced, appeared in effect to be a lease but had only an agreement stamp:—Held, that it was insufficient, and was therefore properly rejected in evidence. (*Turner* v. *Power*, H. T. 1828, K. B., 7 B. & C. 625).

‡ To a count on a bill of exchange (against the acceptor), the defendant pleaded that the bill was not duly stamped or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty, chargeable or charged thereon, had been or was duly stamped, marked, or impressed thereon:—Held bad on special demurrer, inasmuch as it was left in doubt whether the bill was altogether unstamped or stamped with a stamp of a higher or lower value than required by law. (*Haward* v. *Smith*, T. T. 1838, C. P., 4 Bing. N. S. 684; S. C. 6 Scott, 438). The want of a stamp need not be pleaded. (*Dawson* v. *Macdonald*, M. T. 1836, Ex., 2 M. & W. 26).

§ In an action to recover the price of goods obtained by a third party from the plaintiff:—Held, that an unstamped instrument which had been made use of in the transaction was receivable as evidence, and that it was immaterial whether the fraud was committed by a party to the instrument or by a third person. (*Keable* v. *Payne*, H. T. 1838, Q. B., 3 N. & P. 531). Where a party applies to a Judge to have a copy of the agreement declared on, semble, it will be only on the condition of making no objection to the stamp. (*Price* v. *Boultby*, 1824, N. P., 1 C. & P. 466). And upon a consent, under a Judge's order, to

IX. RELATIVE TO COSTS*.

X. RELATIVE TO INDICTMENTS†.

Standing Crops.

See tits. *Crops—Frauds, Statute of—Goods.*

Stannary Courts‡.

Statute§.

BEAUMONT *v.* MOUNTAIN, H. T. 1834. C. P. 10 *Bing.* 404.

If a statute is to be taken notice

A PRIVATE act of Parliament, containing a clause which enacts, "that the act shall be received and taken to be a public act, and

admit documents of a deed as "a counterpart:"—Held, that it was too late afterwards to object to the insufficiency of the stamp, it appearing to be the original instrument. (*Doe* v. *Smith*, 1836, N. P., 2 M. & Rob. 7).

By 1 & 2 Vict. c. 85, stamps, denoting the duties payable on deeds, &c. in either part of the United Kingdom, permitted to be used in the other.

* Where a motion was made to compel a defendant to produce an instrument to have it stamped, the Court, on making the rule absolute, refused to allow more costs than the plaintiff would have been entitled to if the application had been made to a Judge at chambers. (*Vaughan* v. *Trewent*, M. T. 1833, Ex., 2 D. P. C. 299).

† To constitute the felony (under the stat. 12 Geo. 3, c. 3, s. 1) of writing some matter or thing liable to stamp duty on paper on which had been before written some other matter liable to stamp duty, before the paper had been again stamped, it is essential that the party writing should do so with some fraudulent intent. (*Reg.* v. *Allday*, 1837, N. P., 8 C. & P. 136). Upon an indictment on 55 Geo. 3, c. 184, the prisoner, a clerk in the Stamp-office, being found by the jury to have innocently cut off pieces of the parchment whereon the stamps were impressed, but afterwards detached the blue paper bearing the stamp, with intent to affix them on other parchment destined to be employed as indentures:—Held, that he was properly convicted, although the jury could not say whether the impressions were issued before or after the passing of the act. (*Rex* v. *Smith*, 1831, N. P., 1 Moo. C. C. 314; S. C. 5 C. & P. 107).

‡ A final order of the Vice-Warden of the Stannary Courts, on the equity side, may be removed into the Queen's Bench, the defendant having gone out of the jurisdiction, in order to issue execution pursuant to 1 & 2 Vict. c. 110, s. 22. (*Harvey* v. *Gilbard*, E. T. 1839, B. C., 7 D. P. C. 616).

§ When general words follow particular ones they are to be construed as applicable to persons ejusdem generis. (*Sandiman* v. *Breach*, T. T. 1827, K. B., 7 B. & C. 96). Where consent is to be obtained under a local act, the thing done must be in strict accordance with the consent. (*Woodward* v. *Cotton*, T. T. 1834, Ex., 1 C., M. & R. 44). Where two acts of Parliament come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other. (*Rex* v. *Justices of Middlesex*, M. T. 1831, K. B., 2 B. & Ad. 819; S. C. 1 D. P. C. 116).

Where the original local act enabled a mining company to extend their capital and works to a certain amount, and enabled them to sue and be sued in the name

shall be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded."

of judicially, an examination is unnecessary.

The Court held, it might be given in evidence without proof of its correctness, by examination with the Parliament roll.

of their secretary, and sect. 11 provided, that, if they increased it beyond that sum, the privilege of so doing should be void; by a subsequent act they were enabled to extend the capital, and the sect. 11 of the former act was repealed; it also empowered the company to apportion their debts amongst the partners for the time being, in proportion to their shares, and to sue for the same by action of debt or otherwise:—Held, that the company might sue a shareholder in the name of their secretary for his proportion of the debts of the company, although incurred before the passing of the second act, and that it was no objection that the company had directed the payment of such debts by instalments. (*Lawrence* v. *Wynn*, T. T. 1839, Ex., 5 M. & W. 355).

The words in a statute, "action of debt or on the case," include assumpsit. (*Corbett* v. *Carpmael*, M. T. 1832, K. B., 2 N. & M. 834).

Plea by statute.]—The 3 & 4 Will. 4, c. 42, s. 1, empowers the Judges to make alterations in the mode of pleading in the superior Courts; but provides, "That no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence in any case wherein he now is or hereafter shall be entitled to do so by virtue of any act of Parliament now or hereafter to be in force." By Reg. Gen. T. T. 1 Vict., it is ordered, "That, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he shall insert in the margin of such plea the words, 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue." By 5 & 6 Vict. c. 97, s. 3, it is enacted, "That so much of any clause or proviso in any act or acts commonly called public, local, and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and give the special matter in evidence, without specially pleading the same, be repealed." Where a defendant may by statute give matter of justification in evidence under the general issue, he will not be permitted to plead the general issue, and also a special plea of justification. (*Neale* v. *M'Kenzie*, T. T. 1834, Ex., 1 C., M. & R. 61). A plea of the general issue, "by statute," is within the meaning and operation of the Rules of H. T., 4 Will. 4, and the Court will not suffer the defendant to put it on the record, together with a special plea, raising the same grounds of defence. (*Legge* v. *Boyd*, M. T. 1840, C. P., 9 D. P. C. 39). In case for injury to the plaintiff's reversionary interest, the defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be tenant in the declaration was not tenant. The defendants were a company incorporated by act of Parliament, which enabled them to plead the general issue, and give in evidence that the act complained of was done in pursuance of the authority of that act. The Court refused to allow the other pleas, together with the general issue. (*Fisher* v. *Thames Junction Railway Company*, T. T. 1837, Ex., 5 D. P. C. 773). Where a statute enables defendants to plead the general issue and give the special matter of defence in evidence, the plea of not guilty so pleaded is not affected by the new rules of Hilary Term, 4 Will. 4, but operates as before they were framed, putting in issue, not only the defences peculiar to the statute, but all that would have arisen at common law. (*Ross* v. *Clifton*, E. T. 1841, Q. B., 11 Ad. & E. 631). Where, in debt for goods, monies, and on an account stated, on special demurrer it was stated that the General Highway Act allowed the defendant to plead the general issue:—Held, that, the last count not being within the statute, the plea was bad:—Held, also, that where such plea is given in an action for any act done under the statute, the plaintiff cannot waive the tort and sue in contract. (*Calvert* v. *Moggs*, T.T. 1839, Q. B., 2 P. & D. 543).

In addressing the Court in aggravation of punishment, upon a conviction for a nuisance, it is competent to the prosecutor to advert to provisions contained in an act relating to a private company, if such act contain a clause declaring it to be a public statute, though it be not referred to in any of the prosecutor's affidavits. (*Rex* v. *Equitable Gas Company*, T. T. 1834, K. B., 3 N. & M. 759).

Staying and setting aside Proceedings.

See tit. *Costs*, and particular heads according to subject-matter.

I. RELATIVE TO STAYING PROCEEDINGS.

(*a*) Power of the judge, p. 470.

(*b*) In what cases.

1. *In general*, p. 470.
2. *On Payment of Debt and Costs*, p. 471.
3. *In second Action for same Cause*, p. 471.
4. *In several Actions to abide Event*, p. 471.
5. *To obtain an Injunction*, p. 471.
6. *In Cases of Bankruptcy*, 472.
7. *In Ejectment*, 472.

(*c*) Rule for, and of the terms, 472.

(*d*) Costs on, p. 472.

II. RELATIVE TO SETTING ASIDE PROCEEDINGS, 472.

I. RELATIVE TO STAYING PROCEEDINGS.

(*a*) Power of the judge*.

(*b*) In what cases.

1. *In general*†.

* A judge at chambers has no power before declaration to order that proceedings be stayed upon payment of debt and costs within a certain time, otherwise judgment for the plaintiff. (*Reynolds* v. *Sherwood*, H. T. 1840, Ex., 8 D. P. C. 183). A judge at chambers cannot, in making an order for staying proceedings on payment of debt and costs, direct that the defendant shall have a longer time to pay than he would otherwise have if the cause proceeded. (*Kirby* v. *Ellier*, M. T. 1834, Ex., 2 C. & M. 315; S. C. 2 D. P. C. 219). A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the Court in its discretion may think proper to impose. (*Jones* v. *Shepherd*, H. T., 1835, Ex., 3 D. P. C. 421).

† If a defendant gives a bill of exchange for a debt, from which he has been discharged by the Insolvent Act, and an action is brought on that bill, he must plead his discharge; and if he gives a warrant of attorney to secure the payment, the Court will not set it aside. (*Naylor* v. *Mopsey*, H. T. 1836, B. C., 4 D. P. C. 669). Proceedings will only be stayed where parties conduct is vexatious. (*Sowter* v. *Dunston*, M. T., 1827, K. B., 1 M. & R. 508). The Court will not stay proceedings upon affidavits tending to shew that there is no debt.

2. *On Payment of Debt and Costs.*

GOWER *v.* ELKINS, H. T. 1838. Ex. 6 *D. P. C.* 335; S. C. 3 *M. & W.* 216.

On a summons to stay, the money tendered should be paid into Court.*

THE defendant took out a summons to stay proceedings, on payment of a sum and costs, in addition to the set-off, and the plaintiff refusing to accept it, the defendant pleaded non assumpsit and a set-off, but did not pay the sum offered into Court.

The Court held, that the plaintiff could not be liable to the subsequent costs; aliter, if the sum tendered had been paid into Court.

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3. *In second Action for same Cause*†.

4. *In several Actions to abide Event*‡.

5. *To obtain an Injunction*§.

(*Smith* v. *Curtis*, M. T. 1833, Ex., 2 D. P. C. 223). So, it is no ground for staying, that the money when recovered would be held by the plaintiff in trust for the defendant. (*Barlow* v. *Leeds*, M. T. 1835, K. B., 5 N. & M. 426). In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt. (*Johnson* v. *Wardle*, E. T. 1835, B. C., 3 D. P. C. 550).

* By Reg. Gen., H. T., 2 Will. 4, it is ordered, "that upon every bailable writ or warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed." The application to stay proceedings on payment of debt and costs must be made within four days after the service of process. (*Bowdidge* v. *Slaney*, 2 Bing. N. S. 142).

† The plaintiff, an attorney, sued the defendant, his agent, for negligence in the conduct of his business, averring general damage. The cause was referred under the usual order of Nisi Prius, and the arbitrator awarded a verdict to be entered for the plaintiff. The plaintiff afterwards commenced a second action for special damage arising out of the same matters, viz., the loss of the business of certain persons named. The Court, on motion, refused to stay the proceedings in this second action. (*Dicas* v. *Jay*, E. T. 1830, C. P., 6 Bing. 519). Where a second action was brought for the same cause of action whilst the former was pending, the Court discharged a rule for staying the proceedings in the second action upon the affidavit of the plaintiff disclaiming the act of his attorney in bringing the first action. (*Souter* v. *Watts*, M. T. 1833, Ex., 2 D. P. C. 263). Where plaintiff nonsuited in first action, Court will not stay proceedings in second till costs of first be paid. (*Beavan* v. *Robins*, H. T. 1827, K. B., 8 D. & R. 42).

‡ Where it was sworn that the causes of action, and the witnesses in each of six actions by different plaintiffs, were different, the Court discharged a rule for staying the proceedings in five until one was tried, the others to abide the event. (*Nicholls* v. *Lefevre*, M. T. 1834, C. P., 3 D. P. C. 135).

§ Where the trustees of a lady, who had authorized the defendant to receive her rents, countermanded his authority, and brought an action to recover the money received by the defendant under that authority:—Held, that the Court had no power to order the proceedings in the action to be stayed, in order to give time to the defendant to obtain an injunction to restrain the action. (*Vanderstegen* v. *Witham*, E. T. 1840, Ex., 6 M. & W. 457). After judgment in an action at law against a contractor for public buildings, the Court refused to stay proceedings, to enable him to file a bill on the equity side, on the plea of having mistaken his course of defence, sufficient grounds not being shewn; semble, if they had, the Court might clearly have interfered under 33 Hen. 8, c. 39. (*Rex* v. *Peto*, M. T. 1826, Ex., 1 Y. & J. 169).

6. *In Cases of Bankruptcy**.

7. *In Ejectment*†. See, also, tit. *Ejectment*.

(*c*) Rule for, and of the terms‡.

(*d*) Costs on§.

II. RELATIVE TO SETTING ASIDE PROCEEDINGS‖.

Stet Processus¶.

* Where a defendant has become bankrupt after action commenced, this Court will not stay proceedings on the ground that the plaintiff has proved his debt under the fiat, but application should be made to the Court of Review or the Great Seal. (*Ransford* v. *Barry*, M. T. 1839, Ex., 7 D. P. C. 807).

† The lessors of the plaintiff brought three ejectments in the Court of King's Bench for the recovery of the same premises; that Court stayed the proceedings in two of the actions, both parties assenting, and the rule was drawn up accordingly. Another ejectment was afterwards brought in this Court upon a different demise, but substantially to the same cause of action. The proceedings were ordered to be stayed. (*Carthew* v. *Brenton*, H. T. 1830, C. P., 6 Bing. 469).

‡ A stay of proceedings cannot be incorporated in a rule nisi for costs of the day for not proceeding to trial. (*Eager* v. *Cutthill*, M. T. 1837, Ex., 6 D. P. C. 125; S. C. 3 M. & W. 60). Where a rule is obtained staying the defendant's proceedings, the defendant is entitled to the whole of the day on which the rule is disposed of for taking the next step, although the regular time may have previously expired. (*Vernon* v. *Hodgins*, H. T. 1836, Ex., 1 M. & W. 151; S. C. 4 D. P. C. 665; S. C. 6 Tyrw. & G. 427). A defendant is not entitled on a motion for costs of the day to stay the plaintiff's proceedings until such costs are paid. (*Gibbs* v. *Goles*, M. T. 1838, B. C., 7 D. P. C. 325). The Court has no power to stay the proceedings in a writ of right until the costs of a prior ejectment are paid. (*Chatfield* v. *Souter*, T. T. 1825, C. P., 3 Bing. 167).

§ Where a defendant took out a summons to stay proceedings on payment of a certain sum, with costs, and the plaintiff refused to accept it, but afterwards, when the money was paid in under a rule of Court, took it out and discontinued: —Held, that the plaintiff was only entitled to costs up to the time of the first offer, though he stated as a reason for not proceeding that he could not find a material witness. (*Hale* v. *Baker*, T. T. 1833, Ex., 2 D. P. C. 125).

‖ Where the plaintiffs, two officers of a banking company were joined, the stat. 7 Geo. 4, c. 46, s. 9, requiring one only to be sued, the Court allowed the plaintiffs to set aside the proceedings, on payment of costs, even after issue delivered. (*Holmes* v. *Binney*, E. T. 1838, C. P., 4 Bing. N. S. 454). Affidavits in support of a rule to set aside proceedings must shew a clear case for relief, and therefore, where it was moved to set aside a judgment on the ground that the accounts between the parties had been investigated, and found to be incorrect, and that the plaintiff had agreed that any error should be rectified:—Held, that they were insufficient in not stating the error was in the amount. (*Preedy* v. *Lovell*, H. T. 1836, Ex., 4 D. P. C. 671).

¶ If an attorney shew cause on his own behalf against a rule for a new trial or a stet processus, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the Court; and if that application is not made when the rule is disposed of, the Court will not afterwards amend the rule as to them. (*Southee* v. *Terry*, E. T. 1834, B. C., 2 D. P. C. 522). The plaintiff having sued under a contract for the purchase of books, and the defendant before the trial of the action having become a bankrupt, the plaintiff proved the price of the books under the fiat, but the defendant having obtained his certificate was held to be still entitled to proceed to trial by proviso. (*Whittaker* v. *Mason*, H. T. 1838, C. P., 6 D. P. C. 429; S. C. 4 Bing. N. S. 303).

Stock.

I. RELATIVE TO WHAT TRANSACTIONS ARE OR ARE NOT LEGAL, p. 473.

II. RELATIVE TO REPLACING STOCK, p. 473.

III. RELATIVE TO FOREIGN STOCK, p. 473.

IV. RELATIVE TO THE BROKER, p. 473.

V. RELATIVE TO PLEADINGS AND EVIDENCE CONNECTED WITH, p. 474.

I. RELATIVE TO WHAT TRANSACTIONS ARE OR ARE NOT LEGAL.

MORTIMER *v.* M'CALLAN, T. T. 1840. Ex. *7 M. & W.* 20.

A party selling stock he is not possessed of is not within the 7 Geo. 2*.

IN assumpsit for stock sold and transferred by plaintiff, and accepted by the defendant, plea, stating an agreement for sale, &c., and that at the time of making such agreement the plaintiff was not possessed of, or entitled to, the stock in his own right, &c.

The Court held, that such contract was not void under 7 Geo. 2, c. 8, s. 8.

II. RELATIVE TO REPLACING STOCK†.

III. RELATIVE TO FOREIGN STOCK‡.

IV. RELATIVE TO THE BROKER.

JOSEPHS *v.* PEBRER, H. T. 1825. K. B. *3 B. & C.* 639; S. C. *5 D. & R.* 542.

A broker cannot maintain an

SEVERAL persons associated themselves together for the purpose of forming a company, to be called the Equitable Loan Bank, to

* Which applies only to fictitious sales, and not where stock is actually transferred. (*Mortimer* v. *M'Callan*, H. T. 1840. Ex., 6 M. & W. 58). Time bargains for stock in foreign funds:—Held, neither void, as illegal at common law, nor within 7 Geo. 2, c. 8. (*Elsworth* v. *Cole*, M. T. 1836, Ex., 2 M. & W. 31). So, a wager on the price of foreign stock is not void at common law, or within the 14 Geo. 3, c. 48, which is confined to wagering polices of insurance. (*Morgan* v. *Pebrer*, H. T. 1837, C. P., 3 Bing. N. S. 457; S. C. 4 Scott, 230).

† In assessing damages on a bond to replace stock, the fair rule is to take the price of the day of trial, or of the day previous. (*Harrison* v. *Harrison*, 1824, N. P., 1 C. & P. 412).

‡ Where, to a declaration for work and labour, plea, that it was done in carrying into effect illegal transactions by sales in foreign stock:—Held bad, the 7 Geo. 2, c. 8, not applying to foreign stocks. (*Wells* v. *Porter*, E. T. 1836, C. P., 2 Bing. N. S. 722; S. P. *Oakley* v. *Rigby*, Id. 73; see, also, supra, n.)

action for shares purchased or premium paid in an illegal company*.

lend money, on the deposit of goods, at a much less rate of profit than the pawnbrokers took. Before an act of Parliament was obtained, a prospectus was circulated setting forth the names of the directors, &c., and transferable shares were sent into the market.

The Court held, that an action could not be maintained for money paid by a broker, the plaintiff, for the use of another person, in buying shares for him at his request, as the contract was altogether void, being in furtherance of an illegal transaction.

V. RELATIVE TO PLEADINGS† AND EVIDENCE CONNECTED WITH.

MORTIMER *v.* M'CALLAN, H. T. 1840. Ex. 6 *M. & W.* 58.

It is a question for the jury to decide, whether credit was given for the price of stock to the broker or to the principal‡.

THE defendant having commissioned one T., a stock-broker, who was indebted to him in a large amount, to purchase stock to the extent of 5000*l.*, T. applied to the plaintiff to sell. The plaintiff, not being in possession of that amount, obtained a loan of it from W., who accordingly transferred stock, standing in his name, to the defendant, being aware that the latter was the purchaser. It is a rule on the Stock Exchange that a member of that establishment is not bound, in purchasing or selling stock, to make payment or give credit to any one who is not a member; but the custom amongst stock-brokers is generally to hold the broker liable, although credit is sometimes given to the principal, if the broker's credit is not deemed sufficient.

The Court held, that, on this state of facts, the jury were properly directed by the Judge to consider whether the plaintiff sold the stock, trusting to T. and to T. only.

* To enable a stock-broker to recover for work and labour, he must be duly licensed. (*Cope* v. *Rowlands*, M. T. 1836, Ex., 2 M. & W. 149). A party employing a broker on the Stock Exchange is bound by their rules, whether such employer is cognizant of them or not; and the broker having paid differences on shares sold through his employer's mistake, which the latter was not possessed of:—Held to be entitled to recover such payments, as also his commission on the sale. (*Sutton* v. *Tatham*, H. T. 1839, K. B., 2 P. & D. 308).

† Before the New Rules, the Court refused, in assumpsit, to allow the general issue, and several pleas setting out distinct transactions; the latter as impeaching the contract, however numerous, might be given in evidence under the general issue. (*Rossett* v. *King*, M. T, 1827, C. P., 1 M. & P. 145).

‡ The defendant's counsel offered in evidence certain documents and accounts, relating to the investment of the stock in question, and shewing the state of the accounts between T. and the defendant. Other evidence had been given of these facts, and the plaintiff, in his reply, admitted that they had been sufficiently proved. The defence turned on a point collateral to this question. This evidence having been rejected:—Held, that its rejection formed no ground for a new trial. To prove the acceptance of the stock by the defendant, evidence was given that T. and a person unknown were seen on the day of the transfer going in the direction of the bank; that some person in company with T. did accept stock on the day in question; and a witness was then called to prove that he had inspected the bank books, and that the signature of the defendant appeared therein as acceptor of stock on that day. This evidence was objected to, and received by the learned Judge:—Held, that it was evidence for the jury of the defendant's being the acceptor of the stock in question, and of his having accepted it from the plaintiff. (*Mortimer* v. *M'Callan*, H. T. 1840, Ex., 6 M. & W. 58).

Stoppage in Transitu.

I. RELATIVE TO IN WHAT CASES IT MAY BE EXERCISED, p. 475.

II. RELATIVE TO THE DETERMINATION OF, AND DIVESTMENT OF THE RIGHT, p. 476.

III. RELATIVE TO LIEN IN CASE OF, p. 476.

IV. RELATIVE TO PLEA OF, p. 477.

I. RELATIVE TO IN WHAT CASES IT MAY BE EXERCISED.

JACKSON *v.* NICHOL, E. T. 1839. C. P. 5 *Bing. N. S.* 508.

C., AS agent, purchased a certain quantity of lead, without any particular destination, from the plaintiff, for his principal at London; but the lead never came into his (C.'s) possession, but remained on the premises of the plaintiff until the party for whom the purchase was made directed, in general terms and without specifying any particular time, that it should be sent, which was done accordingly by C., who received a delivery note for the purpose from the plaintiff, to which he himself added an order to have the lead taken on ship-board.

The mere giving a deliver order to the vendee's agent, and the latter endorsing it, will not prevent the vendor's exercise of the right*.

* The right may be exercised any time before goods delivered at place of final destination. (*Coates* v. *Railton*, E. T. 1827, K. B., 6 B. & C. 422; S. P. *Bartram* v. *Farebrother*, M. T. 1826, C. P., 4 Bing. 579). A delivery to a wharfinger before claimed by the consignee will not prevent stoppage in transitu. (*Tucker* v. *Humphrey*, H. T. 1825, C. P., 4 Bing. 516; S. C. 1 M. & P. 378). The mutual shipping of goods, not specifically in return, does not prevent the exercise of the right on the vendee's refusal to accept bills. (*Wood* v. *Jones*, E. T. 1839, K. B., 7 D. & R. 126). So, delivery at a wharf at the request of consignee's clerk does not destroy the right to stop. (*Edwards* v. *Brewer*, E. T. 1837, Ex., 2 M. & W. 375; S. P. *Townley* v. *Crump*, M. T. 1835, K. B., 5 N. & M. 606). But storing the goods to be weighed at a wharfinger's will not prevent the delivery being complete. (*Swanwick* v. *Sothern*, H. T. 1839, Q. B., 1 P. & D. 648; S. C. 9 Ad. & E. 895).

In trover for wheat, the defendants pleaded that the wheat was sold by them to the plaintiffs, under an agreement, that the payment of the price should be made by a banker's draft, at a certain date, upon receipt by the plaintiffs of the invoice and bill of lading; and that the plaintiffs failed, on receipt of the invoice and bill of lading, to tender or remit a banker's draft, and remitted an acceptance of the plaintiffs, whereupon the defendants detained the wheat on board the vessel, rescinded the contract, and disposed of the wheat for their own advantage:—Held, that trover was not maintainable, inasmuch as the plaintiffs could not be said to have the right of property in the goods and the right of possession, unless they transmitted, upon the receipt of the said invoice and bill of lading, a banker's draft, according to the agreement, and which they failed to do. (*Wilmshurst* v. *Bowker*, E. T. 1839, C. P., 5 Bing. N. S. 541).

A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors, and the amount of the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it:—Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage in transitu did not apply under the circumstances. (*Nichols* v. *Hart*, M. T. 1831, N. P., 5 C. & P. 179).

The Court held, that, under such circumstances, the plaintiff was not deprived of his right of stoppage in transitu, inasmuch as C., the agent, never had such possession of the article as would amount to a constructive possession on the part of his principal.

II. RELATIVE TO THE DETERMINATION OF, AND DIVESTMENT OF THE RIGHT.

WESTZYNTHIUS, *In re*, M. T. 1833. K. B. 2 *N. & M.* 644.

Although the right of stoppage is determined, there may still be an equitable right to do it*.

THE vendor's legal right of stopping in transitu had been determined by the indorsement of the bill of lading, but such transfer had been made only as a security for advances made by the indorsee.

The Court held, upon a reference to an arbitrator, that the vendor had an equitable quasi right of stoppage in transitu, subject to the previous right of the indorsee to be repaid his advances, and the attempt to exercise such right created an equitable title.

III. RELATIVE TO LIEN IN CASE OF.

NICHOLLS *v.* LE FEUVRE, T. T. 1835. C. P. 2 *Bing. N. S.* 81.—S. P. MORLEY *v.* HAY, M. T. 1828. K. B. 3 *M. & R.* 396.

A party can claim no lien against the consignee until the transitus is at an end.

A TRADER of G., who was in the habit of purchasing goods in L., and sending them to the defendant, his general agent at S., there to be shipped for G., purchased certain goods of the plaintiff in L., which he directed to the defendant at S., to be conveyed to G. by the next packet. The goods arrived at S. by the waggon,

* The receipt of bills of exchange does not affect the vendor's right to stop. (*Edwards* v. *Brewer*, E. T. 1837, Ex., 2 M. & W. 375). And, where goods were consigned to the vendee at S., and whilst at the defendant's wharf, the vendee having stated his insolvency to the vendor, and obtained his consent to rescind the contract, the defendant consented to receive the amount of the carriage from the latter, and nailed his card to the article, but he subsequently refused to deliver it until his whole demand against the vendee, as on a general lien, was paid;—Held, that the right to stop in transitu continued until the goods had reached the ultimate destination, or the vendee had given a new direction to them, and that a general lien could not be sustained against the party having a right to stop in transitu. (*Morley* v. *Hay*, M. T. 1828, K. B., 3 M. & R. 396). But part delivery by a carrier to the consignee is primâ facie such a virtual delivery of the whole, as puts an end to the consignor's right of stoppage in transitu. (*Betts* v. *Gibbins*, M. T. 1834, K. B., 4 N. & M. 64; S. C. 2 Ad. & E. 57). So, besides removing part of goods, taking samples of other parts while in carrier's warehouse puts an end to the transitus. (*Foster* v. *Frampton*, M. T. 1826, K. B., 6 B. & C. 107).

If trover is brought, and the intended defence is, that the defendant was the consignor of the goods, and had a right to stop them in transitu, and the plaintiff, in anticipation of this, sets up that he bonâ fide bought the goods of such consignor before the stoppage in transitu, it is defeated. (*Brain* v. *Harden*, T. T. 1825, N. P., 2 C. & P. 52).

It is sometimes a question for the jury, whether a vendee takes possession for his own benefit or for the vendors. (*James* v. *Griffin*, H. T. 1836, Ex., 3 M. & W. 20; S. C. 1 Tyrw. & G. 449). And it is a question for the jury, whether the goods arrived at their place of final destination. (*Allan* v. *Gripper*, H. T. 1832, Ex., 2 C. & J. 218; S. C. 2 Tyrw. 219).

and were shipped by the defendant in his own name; he also paid the waggoner. Before the vessel sailed, the purchaser became insolvent, and wrote to the defendant to stop the goods until further orders. This was done by the defendant's clerk; and, at the same time, another person, from whom the insolvent had purchased goods, arrived at S., and desired his own goods to be stopped, and though unauthorized gave similar directions respecting those of the plaintiff. The goods were unshipped, and the defendant being applied to to return them to the persons from whom the purchaser, now a bankrupt, obtained them, he refused, and claimed a lien for his general balance against the bankrupt. In trover for the value of the goods, the jury found that the defendant stopped the goods for the benefit of the owners.

The Court held, under the circumstances, that the transitus was not terminated, and that the defendant was not entitled to maintain his lien.

IV. RELATIVE TO PLEA OF.

BRANCKER *v.* MOLYNEUX, T. T. 1840. C. P. 1 *Scott, N. S.* 553; S. C. 1 *M. & G.* 710.

IN trover by assignees for bales of cotton, plea, justifying the detaining, as agents of the consignors, in transitu, the consignee being insolvent; new assignment, that the action was brought for bales "different from and other than the said bales of cotton in the introductory part of that plea mentioned," and also for that the defendant converted &c. the said last-mentioned bales of cotton "on other and different occasions and times, and for other and different purposes, and in another and different manner than in the said plea mentioned;" to which the defendant pleaded "not guilty."

The Court will look to the substantial meaning of the plea, if not demurred to.

The Court held, that, as the words "last-mentioned" might be taken to refer to the bales mentioned in the introductory part of the plea, and so no inconsistency, the Court would look at the substantial meaning of the plea, although on demurrer it might have been questioned as inconsistent.

Striking out Counts. See tit. *Declaration.*

Striking out Pleas. See tit. *Pleas.*

Subpœna. See tit. *Witness.*

Sunday. See 29 Car. 2, c. 7.

See tits. *Bills and Notes—Contract—Frauds, Statute of.*

FENNELL *v.* RIDDLER, E. T. 1826. K. B. 5 *B. & C.* 406; S. C. 8 *D. & R.* 205.

Warranty of a horse sold on Sunday by a horse-dealer cannot be enforced*.

THIS was an action upon the warranty of a horse. The plaintiffs were horse-dealers, and the horse was bought and the warranty given on a Sunday; and the only question was, whether, under the 29 Car. 2, c. 7, the purchase was illegal, and the plaintiffs precluded from maintaining the action.

Per Cur.—That statute enacts, "That no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's-day, or any part thereof, works of necessity and charity only excepted." That the purchase of a horse by a horse-dealer is an exercise of the business of his ordinary calling, no one can doubt; and is there any thing in the spirit or frame of this act which will take such a purchase out of its operation? The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit, unless it is so construed as to check the career of wordly traffic.

Supersedeas. See tits. *Bankrupt—Prisoner.*

Suppression of Vice, Society for the †.

Surety and Principal.

I. RELATIVE TO THE RIGHTS OF, p. 479.

II. RELATIVE TO THE LIABILITY OF, p. 479.

* Nor a contract made on a Sunday by the plaintiff's broker. (*Smith* v. *Sparrow*, M. T. 1826, C. P., 4 Bing. 84). But where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—Held, that the bill was not void under the stat. 29 Car. 2, c. 7. (*Begbie* v. *Levi*, M. T. 1830, Ex., 1 C. & J. 180). And where a contract is made on a Sunday for the sale of a chattel, the plaintiff may recover on a subsequent promise. (*Williams* v. *Paul*, T. T. 1830, C. P., 6 Bing. 653).

† On an indictment for a misdemeanour, at the instance of the Society for the Suppression of Vice, the Court granted a rule that the prosecutors should furnish a list of the names of the members of the society to the coroner and attorney of the Court at the time of nominating a special jury, and that each might be asked when called at the trial whether he was a subscriber, and if so, to be a good cause of challenge. (*Reg.* v. *Nicholson*, E. T. 1840, B. C., 8 D. P. C. 422).

III. RELATIVE TO THE DISCHARGE, p. 480.

IV. RELATIVE TO AGREEMENT TO INDEMNIFY, AND OF CONTRIBUTION, p. 481.

V. RELATIVE TO PLEADINGS, p. 481.

VI. RELATIVE TO EVIDENCE, p. 481.

VII. RELATIVE TO WITNESSES, p. 482.

I. RELATIVE TO THE RIGHTS OF.

BARDWELL *v.* LYDALL, E. T. 1831. C. P. 7 *Bing.* 489.

A surety is entitled to the benefit of any dividend paid by his principal*.

A GUARANTIE was for "the payment of any debt which A. may contract to any amount not exceeding 400*l.*," and A. failed, being indebted 625*l.*, in respect of which the creditor received 8*s.* 7*d.* in the pound from his estate.

The Court held, that the surety was only liable for the remaining 11*s.* 5*d.* in the pound on the 400*l.*

II. RELATIVE TO THE LIABILITY OF.

WARRE *v.* CALVERT, T. T. 1837. K. B. 2 *N. & P.* 126.

A surety is not responsible beyond the sum named in his indemnity†.

IN an action against a surety, on a contract for works, to be paid for as the work proceeded, but the contractor becoming bankrupt, and having received advances beyond what he was entitled to under the contract, and for which extra advances security had been taken—

The Court held, that, in respect of the latter, the surety was not liable for the loss sustained by the non-fulfilment of the works, not being liable beyond the sum named in his indemnity.

* A. and B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A. and recovered:—Held, that, in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B., either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees. Held, also, that if A., after the verdict in the action against him on the bond, obtain a sum of money from C., he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs or the taxed costs of the obligees. (*Knight* v. *Hughes*, M. T. 1828, N. P., 1 M. & M. 247; S. C. 3 C. & P. 467).

A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence to an action on the bond for a deficit subsequent to the letter, if it be not pleaded specially. If it be pleaded, quære. (*Hough* v. *Warr*, 1824, N. P., 1 C. & P. 151).

† There is a difference among the judges, whether the surety can be called on

III. RELATIVE TO THE DISCHARGE *.

STONE *v.* COMPTON, M. T. 1838. C. P. 5 *Bing. N. S.* 142.

A surety will be discharged from liability, if he can shew that fraud has been practised upon him.

THE defendant joined in a note as surety on an advance to a third party, with a mortgage as a collateral security, in which it was recited, that a previous debt from C. had been paid, but which was in fact agreed to be retained out of the second advance.

The Court held this to amount to such a fraud in law as to invalidate the defendant's liability as surety on the note.

before the principal's property is exhausted. (*Gwynne* v. *Burnell*, 1840, Dom. Proc., 1 Scott, N. R. 711; S. C. 6 Bing. N. S. 453).

In debt upon a bond, given by a surety for the due performance of his duties by a collector of taxes—Held, firstly, that such bond, being given to the Commissioners, was good, although conditioned to pay the monies collected to the Receiver-General and to the Commissioners, notwithstanding, by the statute, the latter are required to pay over such monies to the Receiver; secondly, that payment of monies collected in one year to the account of a different year, in order to cover deficiencies, was a breach of the condition duly to pay over &c.; thirdly, that the sale of the lands and goods of the defaulter was a condition precedent to any action against the surety, (diss., *Abinger*, L. C. B., and *Parke*, B.); but that, to make such condition available, the surety is bound to aver and prove notice to the Commissioners, or that they had knowledge of the existence of such lands, &c., (diss., *Denman*, L. C. J., and *Williams*, J.); and, lastly, that, upon the plea of general performance by the principal, one of the breaches being the failure to pay on the days and times appointed by the act (which in fact did not appoint any, but empowered the Receiver to do so), it would be presumed that the Receiver had appointed days for such payment. (*Gwynne* v. *Burnell*, 1840, Dom. Proc., C. P., 1 Scott, N. R. 711).

Where creditors, whose debts were secured by certain promissory notes, gave further time for payment of the debt to the principal debtor by deed, without the consent of the surety, but afterwards, and before the notes became due, the surety consented to the giving of time:—Held, that a consent so given by the surety revived his liability upon the notes. (*Smith* v. *Winter*, M. T. 1838, Ex., 4 M. & W. 455).

The provision in Magna Charta, c. 8, that sureties shall not be distrained if the principal debtor be sufficient, being an abridgement of the common-law right of the Crown, does not extend to sureties equally bound with the principal, but to pledges and nuncupators only, who are but conditional debtors only, and who by express words are not responsible unless upon default of their principals. (*Att.-Gen.* v. *Atkinson*, H. T. 1827, Ex., 1 Y. & J. 207).

Parties being sureties for a bankrupt in execution are liable under the 6 Geo. 4, c. 16. (*Duncan* v. *Sutton*, H. T. 1835, C. P., 1 Bing. N. S. 431; S. C. 1 Scott, 338).

* A guarantie provided, that the principal might extend the period of credit, and hold over or renew bills, and compound with him or the parties liable, as the plaintiff might think fit, without in any manner discharging the surety:—Held, that a discharge and release under a composition deed of the debtor did not discharge the surety. (*Cowper* v. *Smith*, M. T. 1838, Ex., 4 M. & W. 519). So, where the plaintiff took a joint note, with the knowledge that the defendant, one of the makers, was only a surety, and afterwards accepted a composition one from the other, and discharged him from arrest:—Held, that, unless such composition were taken with the express consent of the defendant, he was discharged. (*Hall* v. *Wilcox*, 1830, N. P., 2 M. & M. 58). But signing certificate of principal does not discharge surety. (*Browne* v. *Carr*, E. T. 1831, C. P., 7 Bing. 508). And a change in the contract, not substantially varying the terms, will not discharge the surety. (*Whitches* v. *Hall*, H. T. 1826, K. B., 5 B. & C. 269; S. C. 8 D. & R. 22). Even in equity, the Court will not relieve a surety by bond upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. (*Heath* v. *Key*, E. T. 1827, Ex., 1 Y. & J. 434).

IV. RELATIVE TO AGREEMENT TO INDEMNIFY, AND OF CONTRIBUTION. See, also, ante, p. 479, n.

THOMAS *v.* COOK, M. T. 1828. K. B. 8 *B. & C.* 728.

THE plaintiff, at the request of the defendant, became a co-surety with him in an indemnity bond to a third person, the defendant undertaking to save the plaintiff harmless.

A promise to indemnify a co-surety is not within the Statute of Frauds*.

The Court held, that such promise to indemnify was not either within the words or policy of the Statute of Frauds, and need not be in writing; and the plaintiff was entitled to recover from the defendant such sum as he had been compelled to pay by virtue of the bond.

V. RELATIVE TO PLEADINGS.

CALVERT *v.* GORDON, H. T. 1828. K. B. 7 *B. & C.* 809; S. C. 1 *M. & Ry.* 497.

IN debt on bond, conditioned for A. B. duly accounting &c., plea, that A. B. did account; replication, that A. B. received divers sums, amounting to £——, for which he did not account; rejoinder, that the sums mentioned in the replication were sums severally received by A. B. of C., D., F., and G., and that he did account for them; surrejoinder, that those sums were other and different from those alleged in the rejoinder to have been received and accounted for by A. B., concluding to the country.

Rejoinder, that A. B. did account; surrejoinder that they were different monies, concluding to the country:—Held good†.

Upon demurrer, the Court held the surrejoinder good, as being a denial of a fact alleged in the rejoinder, and properly concluding to the country.

VI. RELATIVE TO EVIDENCE.

WHITNASH *v.* GEORGE, M. T. 1828. K. B. 8 *B. & C.* 556.

A BOND was conditioned, that a banker's clerk should faithfully account to his employers for all sums received by him on their account, and should faithfully conduct himself in that employment.

That which is evidence against the principal is evidence against the surety‡.

The Court held, that a book containing entries made by him, in

* Where three sureties became bound for their principal in distinct sums, and by separate instruments, which were found to be distinct obligations:—Held, that there was no right of contribution. (*Coope* v. *Twynam*, 1 T. & Russ. 426).

† To a declaration upon a bond given by a collector of assessed taxes and his sureties, the defendant, a surety, pleaded pleas shewing that the Commissioners and Receiver-General had not taken the steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes:—Held, on general demurrer, that those pleas were bad. (*Wilks* v. *Heeley*, M. T. 1832, Ex., 1 C. & M. 249; S. C. 3 Tyrw. 91).

‡ A. was clerk to B. from the year 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that B. dismissed A., and after his dismissal A. made an admission of various sums that he had not accounted for:—Held, that, in an action on the bond, this admission was not evidence against C., as A. was living at the time of the trial, and might have been called as a witness. Held, also, that, it appearing that one item in the admission was of a sum received by A. before the date of the bond, C. would not be liable to the amount

the course of that employment, of sums received by him from the customers, was admissible in evidence to shew the fact of those sums having been so received, although some of the persons who made the payments to the clerk were living. Whatever is evidence against the principal is admissible against the surety.

VII. RELATIVE TO WITNESSES*.

Surgeon†. See also tit. *Apothecary*.

Surrender‡.

WALLS *v.* ATCHESON, E. T. 1826. C. P. 3 *Bing.* 462.

If a tenant quits before his term

IN assumpsit, it appeared that the defendant, on the 14th September, hired apartments of the plaintiff, at a yearly rent of 65 guineas,

of the admission, although it had been shewn to him, and he had said that B. must get what he could of A., and he (C.) would pay the rest. (*Smith* v. *Whittingham*, T. T. 1833, N. P., 6 C. & P. 78). If, in an action on a bond against a surety, non-payment by the principal, after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment, semble, that it will be otherwise. (*Barwise* v. *Russell*, E. T. 1829, N. P., 3 C. & P. 608).

* In an action against the surety of a tax collector:—Held, that one who had paid taxes to the collector was not a competent witness to prove such payment, on the ground that he would be liable to contribute to a re-assessment in case of there being an ultimate deficiency. (*Middleton* v. *Milton*, H. T. 1829, K. B., 10 B. & C. 317).

† Where part of the demand was for medicines furnished, as well as for attendance in a surgical case:—Held, that he might recover; and semble, if part had been for dispensing as an apothecary, he might have relinquished that part of his demand and recovered the residue. (*Simpson* v. *Rolfe*, H. T. 1834, Ex., 4 Tyrw. 325).

A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice; but in an action against him, the plaintiff must shew that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop, and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation, if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result. (*Hancke* v. *Hooper*, H. T. 1835, N. P., 7 C. & P. 81).

‡ The acceptance of a new tenant amounts to a surrender in law, (*Reeve* v. *Bird*, T. T. 1834, Ex., 1 C., M. & R. 31; S. C. 4 Tyrw. 612), so, under a parol holding, if in the middle of a quarter the tenant says "I shall quit," and the landlord assents and accepts the keys, that is a rescission of the contract. (*Grimman* v. *Legge*, T. T. 1828, K. B., 8 B. & C. 324), So, where two tenants, under different landlords, agreed by parol to exchange lands, and to pay each other's rents, and which was assented to by the steward of both landlords:—Held, that the effect was a substitution and a surrender by operation of law, and a creating a new demise. (*Bees* v. *Williams*, H. T. 1836, Ex., 1 Tyrw. & Gr. 23). And where the lessors of the plaintiff, for the purpose of establishing their title,

and, after paying a quarter's rent, quitted them; after remaining some time vacant, for which rent was afterwards paid, the plaintiff re-let them at a guinea a week, and continued to do so until July, when, failing to procure other lodgers, she demanded the amount necessary to make up the year's rent.

ends, and the landlord re-lets, it is equivalent to a surrender.

The Court held, that, having precluded the defendant from occupying by letting to another, she must be taken to have rescinded the agreement, and have dispensed with the necessity of a surrender, and that she ought to have given notice to defendant, if her intention had been solely to let on his account.

DOE *d.* HORNBY *v.* GLENN, E. T. 1834. Q. B. 1 *Ad. & E.* 49.

A surrender must be made

IN ejectment, it appeared that a party, acting as executor de son tort of a lessee dying in bad circumstances, the landlord having relied on the following document, signed by three out of four of the representatives of a tenant from year to year:—"We hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, use, trust, term and terms of years whatsoever, unto the churchwardens and overseers for the time being, and possession of and in all that messuage &c., in the parish of ——, formerly in the possession of," &c.:—Held, that the instrument was a surrender, not a disclaimer; and, consequently, that, to make it admissible in evidence, it should be stamped with a deed stamp. (*Doe* d. *Wyatt* v. *Stagg*, M. T. 1839, C. P., 7 Scott, 690; S. C. 5 Bing. N. S. 564). But where the tenant, who had paid rent both to the trustee and cestui que trust, on the last day of the term delivered up the key to the former, who, in fact, had not the legal estate:—Held, that the act, being equivocal, could not be deemed either a surrender or forfeiture. (*Auckland* v. *Lutley*, H.T. 1839, Q. B., 1 P. & D. 636; S. C. 9 Ad. & E. 879). And where a yearly tenant, holding from Christmas, gave a half-year's notice in writing to determine his tenancy at Midsummer:—Held, in an action of ejectment brought upon this notice, that the tenancy was not thereby determined, as it was not a sufficient notice to quit, and that, being in futuro, it would not operate as a surrender by a notice in writing within the Statute of Frauds. (*Doe* d. *Murrell* v. *Milliard*, H. T. 1838, Ex., 3 M. & W. 328). However, if a tenant from year to year give a notice to quit, not expiring with the year, the landlord, if the notice be in writing, and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy. (*Aldenburgh* v. *Peaple*, H. T. 1834, N. P., 6 C. & P. 212).

Where a trust term was created by devise for payment of annuities and other purposes, and the remainderman eighteen years after the death leased the premises to the plaintiff, who received the rents thereof:—Held, that the jury, in an action by the plaintiff for an injury to his reversionary interest, could not presume a surrender of the trust term. (*Day* v. *Williams*, E. T. 1832, Ex., 2 C. & J. 460). So, the circumstance of an outstanding term not being noticed in the marriage settlement of the person entitled to the inheritance, does not warrant a presumption that the term has been surrendered. (*Doe* d. *Blacknell* v. *Plowman*, E. T. 1831, K. B., 2 B. & Ad. 573; see 2 Meriv. 342; 3 B. & C. 616; 2 B. & Ad. 710–782). Presumption of surrender of a term can only be made where a title has been shewn by the party who calls for the presumption, good in substance, but wanting in some collateral matter necessary to complete it in point of form, and the possession has been consistent with the existence of the fact required to be presumed. (*Doe* d. *Hammond* v. *Cooke*, H. T. 1830, C. P., 6 Bing. 174; S. C. 3 M. & P. 411).

A term of 500 years, created in 1712, was, upon a sale of the estate in 1785, assigned to attend the inheritance. Upon a subsequent sale in 1795, there was a general declaration in the conveyance, that all persons having outstanding terms should hold them in trust to attend the inheritance, but no particular term was specified:—Held, that, in support of the grant of the stewardship, made in 1821, it was properly left to the jury to say whether they thought the term had been surrendered, and that they were justified in finding that it had. (*Bartlett* v. *Downes*, H. T. 1825, K. B., 3 B. & C. 616; S. C. 5 D. & R. 526; S. C. 1 C. & P. 522).

A lease being in possession of the lessor is not evidence of a surrender, nor any ground for presuming that there was a lease in existence. (*Doe* d. *Courtail* v. *Thomas*, H. T. 1829, K. B., 9 B. & C. 288; S. C. 4 M. & R. 146).

by a party having the right to make it*.

a right of re-entry for rent in arrear twenty-eight days, which happened, agreed with the landlord to give up possession, if the claim to rent were abandoned, and he afterwards administered.

The Court held, that he was not concluded by such agreement, nor could the landlord acquire a right of possession upon an arrangement with a party who at the time had no right to make it, he not having entered as for the forfeiture, nor obtained a formal surrender.

Surveyor†.

Taxes‡. See also tit. *Extent.*

Tenant in Common §. See also tits. *Distress—Will.*

* A. and B. were parties to a lease as partners. B. withdrew. The lessor agreed to accept C., but no new lease was executed:—Held, not a surrender as to B. (*Graham* v. *Whichelo*, M. T. 1832, Ex., 1 C. & M. 188; S. C. 3 Tyrw. 201).

† The guardians of a union employed an architect to furnish them with plans, specifications, &c., of a workhouse, which they intended to build. He submitted certain advertisements and instructions for such builders as might wish to be employed to their legal adviser's clerk; and, without their express directions, he employed a surveyor, for the purpose of taking out the quantities according to his plans. Finally, the guardians, disapproving of the architect, rejected his plans, refused to accept any tender for the performance of the work according to those plans, and acted upon plans submitted by another person. In an action brought against them by the surveyor, for refusing to pay him for taking out the quantities, the jury having found that the architect, in employing the plaintiff for such purpose, acted within the scope of his authority, as their recognized agent in such respect, and only did that which was sanctioned by the usage and course of his business, the Court refused to disturb the verdict:—Held, also, that defendants could derive no advantage from a condition of the advertisement that the surveyor was to be paid for taking out the quantities by the successful competitor, inasmuch as the fact of there being no successful competitor was occasioned by their own conduct in rejecting the architect's plans and suspending the operations under them. (*Moon* v. *Witney Guardians*, T. T. 1837, C. P., 3 Bing. N. S. 814).

‡ The Crown cannot proceed by personal information in the Exchequer to recover taxes from defaulters, returned as such under the provisions of the 5 & 6 Will. 4, c. 20, s. 13. (*Attorney-General* v. *Sewell*, H. T. 1837, N. P., 8 C. & P. 376).

An information in the nature of the popular action of debt cannot be maintained for the recovery of arrears of assessed taxes, (the 5 & 6 Will. 4, c. 20, s. 13, having made such debt recoverable as a debt upon record), but the proper mode of proceeding is by sci. fa., extent, or by filing an information upon the record itself. (*Attorney-General* v. *Sewell*, T. T. 1838, Ex., 4 M. & W. 77; S. C. 6 D. P. C. 673).

In order to authorize a levy under 43 Geo. 3, c. 99, s. 33, for arrears of assessed taxes, it is not necessary that those arrears should have been demanded by the collector in person from the householder in person, or that there should have been a direct refusal of payment to the collector in person, but it is sufficient if a demand have in fact been made by the collector, or a person authorized by him, and the householder has refused payment, whether on the ground of inability or for any other cause. Nor is it necessary that the collector should in the demand have specified the exact sum. (*Rex* v. *Ford*, H. T. 1833, K. B., 4 N. & M. 451).

§ A surviving tenant in common may sue for the whole rent due at the time of the death. (*Wallace* v. *M'Laren*, H. T. 1828, K. B., 1 M. & R. 516). Te-

Tenant in Fee.

See also tit. *Will.*

Doe *d.* Knott *v.* Lawton, E. T. 1838. C. P. 4 *Bing. N. S.* 455.

That which is excepted carries the same quantity of estate as that from which it was excepted*.

The testator devised as follows:—"I give and bequeath to my sons, Joshua and James, my estates that I now occupy, together with the factory, and all the edifices and appurtenants thereon, except the house I now occupy, and five yards for a passage, being together eighteen yards in front and about twenty yards back, with the cottages thereon, occupied by C. and C., and all other conveniences thereon, which I give to my daughters, Martha and Alice, jointly, share and share alike.

The Court held, that, as the first devise of "my estates" &c. to the sons, James and Joshua, would, standing per se, carry a fee, so the devise of the excepted part carried an estate of a like quality to the daughters.

Tenants, Joint.

See also tit. *Will.*

Morris *v.* Barrett, T. T. 1829. Ex. 3 *Y. & J.* 384.

Where property was left to two as joint tenants, and they purchased property with the proceeds: —Held, that, as to the property subsequently purchased, they were tenants in common†.

A father devised real and personal estate to his two sons in terms giving a joint estate, and appointed them joint executors; they continued in possession and carried on the farm jointly, and shared the profits in common, without any actual severance or division, and purchased other lands with the surplus in the name of one.

The Court held, upon his death, that, as to the property derived from the father, they remained joint tenants, but as to all the after-purchased estates they were tenants in common.

Tenant in Tail‡. See also tit. *Will.*

nants in common cannot maintain a joint action to recover double value under 4 Geo. 4, c. 23, if a joint demise, which is a fact for the jury, be not proved. (*Wilkinson* v. *Hall*, E. T. 1835, C. P., 1 Bing. N. S. 713).

* Where, in ejectment, the lessor of the plaintiff commenced his title by shewing a conveyance in fee from S. in 1807, evidence, that S. was in possession of the property in the years 1806 and 1807, is evidence of his seisin in fee, unless there be something to shew that he had a less estate. (*Doe* d. *Graham* v. *Penfold*, 1838, N. P., 8 C. & P. 536).

† To debt for rent by a joint tenant as survivor the defendant may plead they were tenants in common. (*Burne* v. *Cambridge*, 1836, N. P., 1 M. & Rob. 539).

‡ Settlement to the use of J. G. for life, remainder to the use of the first son of the body of J. G. by A. S., his intended wife; and for default of such issue to the use of the second, third, and other sons of the body of J. G. by A. S., severally and successively as they shall be in seniority of age, and of the several heirs male of their several bodies; and for default of such issue, then, in case A. S.

Tenant at Will.

See, also, tit. *Landlord and Tenant.*

DOE *d.* BLAIR *v.* STREET, M. T. 1834. K. B. 4 *N.* & *M.* 42.

A demand on the wife of the tenant on the premises is sufficient.

A PARTY, upon a contract of purchase, had been let into possession, and had let to B., who had underlet a part to C., as tenant at will.

The Court held, that a demand of possession upon the wife of C. upon the premises, was sufficient to determine the tenancy at will, and to entitle the lessor of plaintiff to recover the premises in the possession of C.; but that a demand on the wife of B. of the premises was not sufficient, the verdict having been obtained against B. and C., who defended for different parts; the Court refused to amend the postea by confining the verdict to the particular premises for which C. defended; B., having also defended as landlord of C.'s premises, could only rely on title, and could not take advantage of any defect in the demand of possession.

Tender.

I. RELATIVE TO IN WHAT CASES IT MAY BE MADE, p. 487.

II. RELATIVE TO BY WHOM MADE, p. 487.

III. RELATIVE TO TO WHOM MADE, p. 487.

IV. RELATIVE TO HOW MADE, AND WHAT AMOUNTS TO, AND AT WHAT TIME, p. 487.

V. RELATIVE TO THE EFFECT OF, AND EFFECT OF ACCEPTING, p. 488.

VI. RELATIVE TO THE PLEA, AND BRINGING THE MONEY INTO COURT, p. 489.

VII. RELATIVE TO THE REPLICATION, p. 489.

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IX. RELATIVE TO THE COSTS, p. 489.

should be enceinte by J. G., to the use of J. P., till A. S. should be delivered, in trust for after-born child or children; and in case such should be a son or sons, to the use of such after-born son and sons, severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons:—Held, that the first son of J. G. by A. S., born during his life, took an estate tail. (*Galley* v. *Barrington*, M. T. 1824, C. P., 2 Bing. 387).

I. RELATIVE TO IN WHAT CASES IT MAY BE MADE*.

II. RELATIVE TO BY WHOM MADE†.

III. RELATIVE TO TO WHOM MADE‡.

IV. RELATIVE TO HOW MADE, WHAT AMOUNTS TO, AND AT WHAT TIME.

FINCH *v.* BROOK, M. T. 1834. C. P. 1 *Bing. N. S.* 253; S. C. 1 *Scott*, 70.

The money should be produced, unless the production be dispensed with§.

UPON an issue of tender, the jury specially found, that the defendant's attorney put his hand into his pocket and said, "I am come to pay you the —— which the defendant owes you," but did not produce the money; to which the plaintiff said, "I can't take it; the matter is now in my attorney's hands."

The Court held this not to warrant a judgment for the defendant, although upon the matter the jury might have found a dispensation.

* To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that, after the bill became due, he tendered plaintiff the amount of the bill with interest:—Held bad upon demurrer. (*Poole* v. *Crompton*, H. T. 1837, Ex., 5 D. P. C. 468).

† Although made by a stranger, it must be taken to be made on behalf of the person who owed the money. (*Cheminant* v. *Thornton*, T. T. 1825, N. P., 2 C. & P. 50).

‡ If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless the attorney disclaims his authority at the time: and if the attorney be absent he is bound by the acts of those whom he allows to represent him at his office; therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good. (*Wilmot* v. *Smith*, M. T. 1828, N. P., 1 M. & M. 238; S. C. 3 C. & P. 453). But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient. (*Bingham* v. *Allport*, H. T. 1833, K. B., 1 N. & M. 398). So, a tender made to a mere collector to a bankrupt's estate is insufficient, he having no authority to take a less sum. (*Blow* v. *Russell*, 1824, N. P., 1 C. & P. 365).

§ Where the party held the notes and money twisted in his hand, and stated what it consisted of, though not opened, it was deemed sufficient. (*Alexander* v. *Brown*, 1824, N. P., 1 C. & P. 288; S. P. *Leatherdale* v. *Sweepstone*, T. T. 1828, N. P., 3 C. & P. 342). So, if, at an interview between plaintiff and defendant, where defendant was willing to pay £10, a third person present offer to go up-stairs and fetch that sum, but is prevented by the plaintiff's saying he cannot take it, such offer is a good tender; and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. (*Harding* v. *Davies*, T. T. 1825, N. P., 2 C. & P. 77). So, "I am instructed by the defendant to say that £15 is more than is due, but that you may have it," is a good tender, the money being produced. (*Thorpe* v. *Burgess*, T. T. 1840, B. C., 8 D. P. C. 603). A tender, to be good, must not be clogged by any conditions. The attorney of A. put down £18, and said to the other party, "I tender you £18 for Mr. M.":—Held, that this was a good tender. (*Jennings* v. *Mayer*, E. T. 1837, N. P., 8 C. & P. 61). So, a debtor went to his creditor, and, procuring a sum exceeding the debt, asked how much was due. The latter refused to tell him, when the debtor laid the money on a desk, and desired the creditor to take what was due:—Held, a good legal

V. RELATIVE TO THE EFFECT OF, AND EFFECT OF ACCEPTING*.

WAISTELL *v.* ATKINSON, M. T. 1825. C. P. 3 *Bing.* 289.

A tender is not equivalent to payment, so as

THE defendant having pleaded a tender as to part, which he paid into Court, and non assumpsit as to the residue, and the plaintiff having taken the money out of Court, proceeded to trial; and the

tender. (*Bevan* v. *Rees*, T. T. 1839, Ex., 7 D. P. C. 510). A tender is not vitiated by the person making it saying, at the time of making it, that it was all the defendant considered to be due. (*Robinson* v. *Ferreday*, 1839, N. P., 8 C. & P. 753).

An offer to pay a given sum is of no avail unless the party has the means of payment at the time, if accepted. (*Strong* v. *Harvey*, M. T. 1825, C. P., 3 Bing. 304).

If a tender is made by a cheque, contained in a letter requesting a receipt in return, and the plaintiff sends back the cheque, and, without objecting to the nature of the tender, demands a larger sum, it is a good tender. (*Jones* v. *Arthur*, E. T., 1840, B. C., 8 D. P. C. 442). But a tender of a cheque is of no avail either in payment of a debt or in performance of a condition precedent on a special contract. (*Clarke* v. *King*, E. T. 1826, N. P., 2 C. & P. 286). A tender of a sum "in full of plaintiff's demand," held insufficient. (*Cheminant* v. *Thornton*, T. T. 1825, N. P., 2 C. & P. 50). It should leave it open to the one party to say that more is due, and to the other that the sum tendered is sufficient. (*Peacock* v. *Dickerson*, T. T. 1825, N. P., 2 C. & P. 51, n.) An inquiry if the party had a receipt, and no actual offer of the money, though produced, is not sufficient. (*Ryder* v. *Lord C. Townsend*, M. T. 1826, K. B., 7 D. & R. 119). A plea of tender is not supported by proving that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt I will pay you the money," as by the statute 43 Geo. 3, c. 126, the payer of money may provide the stamp, and charge for it, and a tender must always be unconditional. (*Laing* v. *Meader*, 1824, N. P., 1 C. & P. 257; S. P. *Griffith* v. *Hodges*, 1824, N. P., Id. 419). A tender, to be good, must be unconditional; so that, if the plaintiff take the money, and there be more due, he may still bring an action for the residue. Therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement":—Held, not a good tender. (*Mitchell* v. *King*, M. T. 1833, N. P., 6 C. & P. 237). If a person offer a sum "as all that is due," it is not a legal tender. (*Sutton* v. *Hawkins*, 8 C. & P. 259). So, insufficient to tender, if party will accept in full of all demands. (*Gordon* v. *Cox*, 1835, N. P., 7 C. & P. 172). So, tender no avail, where offer accompanied with a requisition that the party should sign a receipt expressing that it was received as the balance of the plaintiff's demand. (*Higham* v. *Baddeley*, 1820, N. P., 1 Gow, 213). Where the sum tendered was as for half a year's rent, which the plaintiff's agent refused:—Held, only a conditional tender, as, if taken, involving an admission of the amount of rent, and therefore bad. (*Marquis of Hastings* v. *Thorley*, 1838, N. P., 8 C. & P. 573). Where the words of the tender were, "I have called to tender £—— in settlement of R.'s bill:"—Held, that it was for the jury to say if the offer was conditional or not. (*Eckstein* v. *Reynolds*, 2 N. & P. 256).

Where the offer in payment of 13*l.* 14*s.* 2*d.* was £14 in bank-notes and sovereigns, and the sum mentioned, but which the party refused to accept, but made no objection to the sum offered not being the precise amount:—Held, sufficient; and that it was unnecessary to get the change and offer the precise sum. (*Atkin* v. *Acton*, H. T. 1830, N. P., 4 C. & P. 208). The production of a larger sum suffices, if no objection be made on that ground. (*Cadman* v. *Lubbock*, M. T. 1824, K. B., 5 D. & R. 289).

Semble, a tender of amount, after an attorney has written for payment, without offering costs of letter, sufficient. (*Kirton* v. *Braithwaite*, E. T. 1836, Ex., 1 M. & W. 310).

* A party, by accepting a sum properly tendered, does thereby compromise his future claim to a larger sum, which he would do if he took a sum offered "as all that was due." (*Sutton* v. *Hawkins*, 1838, N. P., 8 C. & P. 259).

plea of tender was found for the defendant, the balance proved on the plea of non assumpsit was under 40*s.*

to authorize a suggestion for costs under Court of Requests Act.

The Court held, that the defendant could not enter a suggestion on the roll to deprive the plaintiff of his costs, under the London Court of Requests Act, 39 & 40 Geo. 3, c. 104.

VI. RELATIVE TO THE PLEA OF, AND BRINGING THE MONEY INTO COURT *.

VII. RELATIVE TO THE REPLICATION †.

VIII. RELATIVE TO THE EVIDENCE.

Dean *v.* James, H. T. 1833. K. B. 1 *N. & M.* 392.

Tender of larger sum than amount to be received supports plea of less sum.

In assumpsit for goods sold, on a plea of tender—

The Court held, that a plea of a tender of 20*l.* is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20*l.*

IX. RELATIVE TO THE COSTS ‡.

* To a declaration in debt, the defendant pleaded as to 15*l.*, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any damages by reason of the non-payment of the said sum of 15*l.*, because he tendered that sum:—Held, sufficient. (*Willis* v. *Prudht*, T. T. 1839, Ex., 7 D. P. C. 460). Where, in indebitatus assumpsit, the defendant pleaded payment of a sum, parcel of several sums &c., and pleaded also a tender of another sum, parcel &c.:—Held, that the latter plea was good, without alleging that the tender was made after the payment. (*Jones* v. *Owen*, T. T. 1836, K. B., 6 N. & M. 620; S. C. 5 Ad. & E. 222).

In an action of debt, the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into Court; judgment having been on that account signed as for want of a plea, the Court set aside the judgment for irregularity. (*Chapman* v. *Hicks*, E. T. 1834, Ex., 2 D. P. C. 641).

† Where the issue is upon a fresh demand, the proof of a letter being sent requesting the money is not sufficient, as the party is entitled to have an opportunity of paying the money demanded. (*Edwards* v. *Yeates*, H. T. 1826, N. P., 1 R. & M. 360; see 1 Camp. 478, n.)

‡ In an action of debt, for a sum exceeding 20*l.*, the defendant pleaded, as to part, a tender before action brought, and to the residue, nunquam indebitatus. The money paid into Court on the plea of tender was accepted, and a nolle prosequi entered as to that, and at the trial the plaintiff had a verdict for a balance of 13*l.*:—Held, that the costs must be taxed on the reduced scale applicable, according to the "directions to taxing officers," Hilary Term, 4 Will. 4, to a recovery of a sum under 20*l.* (*Dixon* v. *Walker*, M. T. 1840, Ex., 8 D. P. C. 887; S. C. 7 M. & W. 214). Where the plaintiff refused to accept a less sum, tendered in discharge of debt and cost, but afterwards consented, the Court refused to deprive him of the intermediate costs, there appearing to be nothing vexatious or intentionally oppressive. (*Hatchard* v. *Hague*, T. T. 1827, C. P., 12 Moore, 66).

Term of Years *.

Terms and Returns †.

Term's Notice ‡.

Terrier. See tit. *Tithes.*

Teste and Return. See tits. *Bail—Execution—Process.*

Theatre §. See 3 & 4 *Will.* 4, *c.* 15, and 6 & 7 *Vict. c.* 68.

* A term of years continues during the whole anniversary of the day from which it is granted. (*Ackland* v. *Lutley*, H. T. 1839, Q. B., 9 Ad. & E. 879; S. C. 1 P. & D. 636).

† The 11 Geo. 4 & 1 Will. 4, c. 70, and the 1 Will. 4, c. 3, regulate the terms and returns.

‡ By Reg. Gen., H. T. 2 Will. 4, where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term. The rule requiring a term's notice before proceeding after the lapse of four terms:—Held, not to apply to proceedings taken on the part of a defendant. (*Shinfield* v. *Laxton*, H. T. 1834, C. P., 4 M. & Scott, 187). And an application to set aside proceedings for irregularity after the lapse of four terms does not require a term's notice. (*Lumley* v. *Thompson*, E. T. 1838, Ex., 3 M. & W. 632). So, a term's notice of proceedings is not necessary after the lapse of four terms, if the delay has taken place at the defendant's request. (*Evans* v. *Davies*, E. T. 1835, Ex., 3 D. P. C. 786).

§ Dramatic performances within twenty miles of London or Westminster, and not in the latter, or the place of the Crown's residence, cannot be rendered legal; and a session's license, under 25 Geo. 2, (which is confined to music and dancing):—Held, not to apply to dramatic representations; and the Lord Chamberlain's license, under 10 Geo. 2, c. 28, can only be granted within the local situation and limits prescribed. (*Levy* v. *Yates*, T. T. 1838, Q. B., 3 N. & P. 249).

A performer who is called on to resume, in consequence of the illness of another, a part in which, by previous performances, she has acquired celebrity, is entitled to reasonable notice previous to the time of performance; such notice to be proportioned to the reputation at stake. (*Graddon* v. *Price*, T.T. 1827, N. P., 2 C. & P. 610).

By a rule of the Dramatic Authors' Society, all damages, recovered by any member of that society in an action on the 3 & 4 Will. 4, c. 15, go (after paying the costs) to the funds of the society. In an action brought by a member of this society, another member of it is not a competent witness for the plaintiff, although the action is brought by the plaintiff on his own behalf, and not by the society, and although his attorney does not look to the society for any part of the costs. (*Planché* v. *Braham*, T. T. 1837, N. P., 8 C. & P. 68).

Upon a conviction under 10 Geo. 2, c. 28, s. 2, for performing plays without the license or patent therein mentioned, at M.:—Held, that the 5th section, confining the power of licensing theatres by the Lord Chamberlain, or granting patents within certain limits, in effect restrained persons from performing over every other part of the kingdom; and the subsequent power given to justices to license by 28 Geo. 3, c. 30, creating an exemption by a different act, it was incumbent on the defendant to shew such exemption. (*Rex* v. *Neville*, T. T. 1830, K. B., 1 B. & Ad. 489).

Threats *, and Threatening Letters †. See 4 *Geo.* 4, *c.* 54, 7 & 8 *Geo.* 4, *c.* 29, and 1 *Vict. c.* 87.

* On an indictment under 7 & 8 Geo. 4, c. 29, for threatening to accuse:—Held, that the words were not confined to an accusing by course of law, but to be taken to mean threatening to charge before any third person. (*Rex* v. *Robinson*, 1837, N. P., 2 M. & Rob. 14). Obtaining money from a wife under threat of accusing her husband of an unnatural offence, is not robbery. (*Rex* v. *Edward*, 1833, N. P., 1 M. & Rob. 257).

A. and B. were indicted for the offence of robbery. The jury found that A. took the property of prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime; but that he was not aiding or assisting in, or privy to, the taking of the property from the prosecutor by violence:—Held, by all the Judges, that, in order to convict B., the indictment should have been framed on the stat. 1 Vict. c. 87, s. 4, and that he could not, since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. (*Rex* v. *Henry*, 1840, C. C. C., 2 Moo. C. C. 118; S. C. 9 C. & P. 309).

Where it was proved that a prisoner, to obtain money, said to a prosecutor, "If you do not assist me, I will say you took indecent liberties with me some time ago;" it was held, not sufficient to sustain a count which charged that he threatened to accuse the prosecutor of having attempted and endeavoured to commit with him "the abominable crime" &c.: semble, that, since the passing of the stat. 7 Will. 4 & 1 Vict. c. 87, s. 4, where money is obtained by any of the threats to accuse specified in that section, the indictment must be on the statute, and not for robbery; but where the money is obtained by threats to accuse, other than those specified in the statute, the indictment may be for robbery, if the party was put in fear, and parted with his property in consequence. Whether an indictment for demanding money with menaces, with intent to steal it, is sustained by proof of the actual obtaining of the money, quære. (*Reg.* v. *Norton*, 1838, C. C. C., 8 C. & P. 671).

On the trial of an indictment for threatening to accuse a person of the abominable crime &c., with intent to extort money, and, by *intimidating* the party *by the threat*, in fact obtaining the money, the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody. (*Reg.* v. *Kain*, 1837, C. C. C., 8 C. & P. 187).

† An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent; and that, if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within the stat. 7 & 8 Geo. 4, c. 29, s. 8, although it appeared that the letter was a mock device to defraud the prosecutor of thirty sovereigns. (*Rex* v. *Pickford*, 1830, N. P., 4 C. & P. 227).

On an indictment for sending a threatening letter, the prisoner's declarations of the meaning of the letter are admissible evidence. An indictment on 4 Geo. 4, c. 54, for sending a letter threatening to accuse of an infamous crime, need not specify such crime, for the specific crime the prisoner threatened to charge might intentionally be left in doubt. (*Rex* v. *Tucker*, 1826, 1 Moo. C. C. 134). An indictment upon 4 Geo. 4, c. 54, s. 5, for charging prosecutor with having committed &c., and threatening to prosecute &c.:—Held insufficient. (*Rex* v. *Abgood*, 1826, N. P., 2 C. & P. 436). An indictment on 4 Geo. 4, c. 54, s. 5, for demanding money &c. must shew by whom it was demanded; and an indictment on the same statute for threatening to accuse &c. must shew who was threatened. (*Rex* v. *Dunkley*, 1825, 1 Moo. C. C. 90). If a party be indicted for sending a threatening letter, the Court will, on motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the Court, that the prisoner's witnesses may inspect it. (*Rex* v. *Harrie*, 1833, O. B., 6 C. & P. 105).

Time*.

WEBB *v.* FAIRMANER, E. T. 1838. Ex. 3 *M.* & *W.* 473.

In a contract "month" means calendar month.

GOODS were sold on 5th October, to be paid for in two months. The Court held, that the action could not be maintained until after the 5th December; in such cases the computation of time would be by calendar months, and would exclude the day on which the contract is made.

Tithes†.

I. RELATIVE TO WHAT TITHEABLE, p. 493.

II. RELATIVE TO THE TITLE TO, p. 493.

III. RELATIVE TO THE RIGHTS OF THE OWNER, p. 493.

IV. RELATIVE TO MODUS, p. 493.

V. RELATIVE TO COMPOSITION, p. 493.

VI. RELATIVE TO THE LONDON TITHE ACT, p. 494.

VII. RELATIVE TO THE MODE OF SETTING OUT, p. 494.

VIII. RELATIVE TO THE GRANT OF, AND WHEN TITHES PASS, p. 494.

IX. RELATIVE TO THE MERGER OF, p. 494.

X. RELATIVE TO THE ACTION FOR NOT SETTING OUT.

(*a*) DECLARATION, p. 494.

(*b*) PLEAS, p. 495.

(*c*) EVIDENCE, p. 495.

* By Reg. Gen., H. T. 2 Will. 4, it is ordered, that, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules of practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

† As several recent statutes have made various alterations in the law connected with tithes, it has been deemed advisable only to insert the cases in the note. (See 2 & 3 Will. 4, c. 100 ; 4 & 5 Will. 4, c. 83 ; 5 & 6 Will. 4, c. 79 ; 6 & 7 Will. 4, c. 71 ; 1 Vict. c. 69 ; 1 & 2 Vict. c. 64 ; 2 & 3 Vict. c. 62 ; 3 & 4 Vict. c. 15 ; 5 & 6 Vict. c. 54).

X. RELATIVE TO THE ACTION FOR NOT SETTING OUT—(*continued*).

(*d*) Witnesses, p. 495.

(*e*) Consolidation of, p. 495.

(*f*) New Trial, p. 495.

I. RELATIVE TO WHAT TITHEABLE*.

II. RELATIVE TO THE TITLE TO†.

III. RELATIVE TO THE RIGHTS OF THE OWNER‡.

IV. RELATIVE TO THE MODUS§.

V. RELATIVE TO COMPOSITION‖.

* The word "or" in the 6th section of 2 & 3 Edw. 6, c. 13, is from the context to be read "as," and consequently barren land, inclosed under an inclosure act, into which the person entitled turned his cattle, but who did not act to render the land more productive than it was before, was held not to be improved thereby within the meaning of the above section, so as to render the land liable to tithes seven years afterwards. (*Ross* v. *Smith*, H. T. 1831, K. B., 1 B. & Ad. 907). The tithe of potatoes arises only when they are dug up, and not in the preparatory step of "houghing out." (*Bearblock* v. *Hancock*, 1826, N. P., 2 C. & P. 425).

† A private act of Parliament, which directs a compensation to be made to the several persons interested "in any lands, sands, tenements, buildings, or other hereditaments," used for the purposes of the act, "for any damage which shall have been done thereto or to the parties interested therein," does not entitle a vicar or lay impropriator to a compensation in respect of titheable lands taken for the purposes of the act, and thereby rendered incapable of producing tithes. (*Rex* v. *Nene Outfall Commissioners*, M. T. 1829, K. B., 9 B. & C. 875).

‡ The tithe owner is entitled to remove his tithes on the same line of road as the occupier. (*James* v. *Dods*, M. T. 1834, Ex., 2 C. & M. 266).

§ Where a modus for tithes covers such as arose from a right of common, the allotment which is given by an inclosure act in lieu of such right is covered likewise, and it matters not that the common, which was before pasture, has been, since the inclosure, converted into arable land. (*Askew* v. *Wilkinson*, H. T. 1832, K. B., 3 B. & Ad. 152). A distinct modus as to clover of 2*d.* a cover for every cover of clover, may exist concurrently with a modus of 2*d.* yearly for every day's math of hay. (*Davies* v. *Moseley*, E. T. 1824, Ex., 1 M'Clell. 143). Tithe or modus for hay exempts the land from agistment tithe for that year, but not if fed only in another year. (*Atkins* v. *Drake*, H. T. 1825, Ex., 1 M'Clell, & Y. 213). Semble, no reliance can be placed on the Ecclesiastical or Parliamentary Survey as to a modus, and the omission affords no valid inference one way or the other. (*Ib.*) To establish a farm modus, it must be distinctly proved that it is an ancient farm. (*Wolley* v. *Brownhill*, E. T. 1824, Ex., 1 M'Clell. 317). As a party, by setting up a modus disclaims the rector's title, he cannot, on failing as to the modus, insist upon it as a composition. (*Ib.*) The mere non-payment of tithes is not a sufficient answer to the claim by a lay impropriator against whom there can be no prescription in non decimando. (*Andrews* v. *Drever*, M. T. 1836, C. P., 2 Scott, 1).

‖ Immemorial usage may be inferred. (*Beresford* v. *Newton*, H. T. 1835, Ex., 1 C., M. & R. 901). A composition can only be determined by six months' notice. (*Hulme* v. *Pardoe*, T. T. 1824, Ex., 1 M'Clell. 393; S. C. 1 C. & P. 93). And the notice must be six months expiring at the end of the time of composition. (*Goode* v. *Howells*, T. T. 1838, Ex., 4 M. & W. 198).

VI. RELATIVE TO THE LONDON TITHE ACT*.

VII. RELATIVE TO THE MODE OF SETTING OUT†.

VIII. RELATIVE TO THE GRANT OF, AND WHEN TITHES PASS‡.

IX. RELATIVE TO THE MERGER OF§.

X. RELATIVE TO THE ACTION FOR NOT SETTING OUT‖.

(*a*) Declaration ¶.

* In an action for tithes, under 37 Hen. 8, c. 12, (London Tithe Act), evidence that the statute and decree have been acted on in the different parishes in London, is admissible to prove that the decree has been inrolled, no inrolment being found in the present records of the Court of Chancery. (*Macdougal* v. *Young*, E. T. 1826, N. P., 1 R. & M. 392).

† It is no objection to the mode of setting out that it puts the tithe-owner to additional expense, if the mode adopted is necessary to save the tithe-payer expense. (*Thompson* v. *Bearblock*, H. T. 1831, K. B., 1 B. & Ad. 812). Each shock of wheat must be equal. (*Walker* v. *Ridgway*, M. T. 1825, C. P., 3 Bing. 317). The tithe-owner cannot control the farmer in any mode of husbandry he may adopt. (*Lewis* v. *Young*, E. T. 1824, Ex., 13 Price, 394; 1 M'Clell. 113; see Bunb. 279; 2 Wood. 185; 2 Gwill. 742; Id. 757; 3 Id. 874; 6 Price, 353). Rakings of corn, &c., when the quantity is great, may be titheable, and be evidence of deceit. (*Glanvill* v. *Stacey*, E. T. 1827, K. B., 6 B. & C. 543). When the order of birth is ascertained, the tenth in order of birth is the tithe calf. (*Tratman* v. *Carrington*, H. T. 1831, Ex., 1 C. & J. 320; S. C. 1 Tyrw. 169). An agreement, substituting a particular manner instead of the common-law form of setting out tithes, is valid. (*Collier* v. *Jacob*, E. T. 1825, C. P., 3 Bing. 106).

‡ Tithes do not pass under the words, "with all profits, hereditaments, and appurtenances to said premises belonging." (*Chapman* v. *Gatcombe*, H. T. 1836, C. P., 2 Bing. N. S. 516; S. C. 2 Scott, 738). Tithes in ancient documents do not necessarily mean payment in kind. (*Beck* v. *Bree*, M. T. 1830, Ex., 1 C. & J. 246). Grantee of tithes and glebe holds them subject to all existing tenancies, and cannot eject tenant coming in under grantor without legal notice. (*Doe* d. *Cates* v. *Somerville*, M. T. 1826, K. B., 6 B. & C. 127). Non-payment of tithes does not raise a presumption of a grant to the land-owner. (*Bayley* v. *Drever*, 1834, Ex. Chamb., 3 N. & M. 885; S. C. 1 Ad. & E. 449; S. C. 2 Bing. N. S. 1).

§ Merger of tithes in land facilitated by 1 & 2 Vict. c. 64, amending 6 & 7 Will. 4, c. 71.

‖ Where, at the time of the passing of the 2 & 3 Will. 4, c. 100, a suit was pending in equity, and under which a composition was set aside:—Held, that the plaintiff was not prevented from proceeding in an action of debt, on 2 & 3 Edw. 6, for not setting out the tithes, before the determination of an appeal pending before the House of Lords against the decision in equity. (*Thorpe* v. *Mattingley*, T. T. 1839, Ex., 5 M. & W. 302). In debt by lessee of tithes of sheaf corn and grain, on 3 Edw. 6, for not setting out the tithes of vetches or tares, severed in a green state:—Held, that he was not entitled to recover. (*Dare* v. *Derham*, E. T. 1838, Ex., 3 M. & W. 539).

¶ In an action for tithes, the plaintiff introduced two counts into the declaration; one for the treble value of tithes not set out, the other for the same tithes bargained and sold:—Held, that this was a violation of the Rule of H. T. 4 Will. 4, reg. 1, s. 5; and the Court ordered the last count to be struck out, with costs, but bound the defendant to agree not to set up a composition at the trial, or that if he did the declaration might be amended. (*Lawrence* v. *Stephens*, E. T. 1835, Ex., 3 D. P. C. 777).

X. RELATIVE TO THE ACTION FOR NOT SETTING OUT—(*continued*).

(*b*) Pleas*.

(*c*) Evidence†.

(*d*) Witnesses‡.

(*e*) Consolidation of§.

(*f*) New Trial‖.

Title Deeds¶.

Toll.

See also tit. *Turnpike*.

I. RELATIVE TO TOLL THOROUGH, p. 496.

II. RELATIVE TO WHEN PAYABLE AND EXEMPTION FROM, p. 496.

* An action of debt upon the stat. 2 & 3 Edw. 6, c. 13, is a penal action within the 4th clause of 21 Jac. 1, c. 4; and consequently in such an action, even since the pleading rules, nil debet is a good plea. (*Earl Spencer* v. *Swannell*, H. T. 1838, Ex., 6 D. P. C. 326; S. C. 3 M. & W. 154). A particular customary mode of tithe may be pleaded in an action for not setting out tithe. (*Pigott* v. *Bayley*, M. T. 1826, K. B., 6 B. & C. 16).

† The vicar's title depending wholly upon the endowment, or upon prescription and usage:—Held, that he could only make out his title to the claim of small tithes by evidence either of endowment, or of prescriptive enjoyment. (*Hiscocks* v. *Wilmot*, 1819, N. P., 1 Gow. 197). A modus decimandi may be proved by a document signed by a former rector, setting out what tithes are usually paid in the parish, although it be not found in the registry of the bishop or archdeacon, but is in the custody of a parishioner. (*Maddison* v. *Nuttall*, M. T. 1829, C. P., 6 Bing. 226).

‡ On an issue to try whether a farm modus of 22*l*. 19*s*. 8*d*. was payable for a certain farm, a former occupier of the farm cannot be asked what he has heard his deceased father say respecting this modus, although his father had also occupied the farm, because this would be evidence of reputation of a fact. (*Wells* v. *New College, Oxford*, 1836, N. P., 7 C. & P. 284).

§ The Court has no jurisdiction to direct several actions or feigned issues as to moduses by parties dissatisfied with the decision of the tithe commissioners, &c., under s. 45 of 6 & 7 Will. 4, c. 71, (Tithe Commutation Act), to abide the event of the issue directed by the Court. (*Ward* v. *Pomfret*, T. T. 1840, C. P., 1 Scott, N. S. 403; S. C. 1 M. & G. 559).

‖ On a question of tithes between the rector and vicar, if the evidence be strong in favour of the former, no new trial will be granted. (*Gilbert* v. *Towns*, T. T. 1834, C. P., 1 Bing. N. S. 173).

¶ The right to title-deeds of an estate follows the right to the estate. And where the purchaser of an estate (in the absence of any fraudulent motive) suffered the vendor to retain the title-deeds, and the latter mortgaged the estate, and delivered over the title-deeds to the mortgagee; it was held, that the mortgagee was equally guilty of negligence in not ascertaining who was in possession of the estate to which the deeds related, as the purchaser was in not getting possession of the deeds; and there was nothing to deprive the latter of the right which, by the above proposition of law, he had: and that, therefore, he might maintain trover for deeds against the mortgagee. (*Harrington* v. *Price*, H. T. 1832, K. B., 3 B. & Ad. 170).

III. RELATIVE TO THE AMOUNT, p. 497.

IV. RELATIVE TO THE CONSTRUCTION OF STATUTES, p. 497.

V. RELATIVE TO COVENANTS CONNECTED WITH, p. 497.

VI. RELATIVE TO THE REMEDY FOR.

(*a*) By action.

1. *Notice of,* p. 497.
2. *Declaration,* p. 497.
3. *Evidence and Witnesses,* p. 498.
4. *Venire de novo,* p. 498.

(*b*) By distress, p. 498.

VII. RELATIVE TO THE POWER OF JUSTICES, p. 498.

I. RELATIVE TO TOLL THOROUGH*.

II. RELATIVE TO WHEN PAYABLE, AND EXEMPTION FROM.

Middleton (Lord) *v.* Lambert, E. T. 1834. K.B. 1 *Ad. & E.* 401.

Under the words "the Dean, &c., and tenants in ancient demesne," lay tenants of the land are included †.

Upon a grant to a Dean, &c., tenants in ancient demesne, to be quit of toll, passage, cheminage, &c., in city, borough, fair, in the passage of bridges, throughout all England. The Court held, that their lay tenants of the land, included in the grant, were exempt, as well for goods sent or coming therefrom for the purpose of merchandise, as for the necessary enjoyment and manurance of the land; sed quære, if the exemption as to the former could be claimed by ecclesiastical persons, or for the mere purposes of trade.

* It is not a sufficient consideration for a toll thorough claimed for passing on all roads within a town, that the party claiming it has repaired one road, a wharf, and a bridge. Where the king, before the time of legal memory, was entitled to the soil of the town of C., and to toll traverse within it, and afterwards granted to the burgesses of the town "the town of C., with all its appurtenances," these words are sufficient to pass the toll. (*Brett* v. *Beales*, M. T. 1829, N. P., 1 M. & M. 426).

† When the Crown grants a fair or market, with an express grant of toll, the grantee is entitled to a reasonable toll, though none be specified in the charter. (*Stamford* (*Corporation of*) v. *Pawlett*, M. T. 1830, Ex., 1 C. & J. 57). A right to toll for metage does not disconnect the right to the toll from the ownership of the port. (*Jenkins* v. *Harvey*, T. T. 1835, Ex., 2 C., M. & R. 393). Uncrushed bones, which are taken through a turnpike to a farm, to be there crushed, and part of them there used as manure, and the residue to be afterwards sold, and to be used as manure at other places, are exempt from toll under the stats. 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. (*Pratt* v. *Brown*, 1838, N. P., 8 C. & P. 244). Under 52 Geo. 3, c. 145, carts, &c., loaded with manure, are exempted, as well as those going empty. (*Rex* v. *Adams*, E. T. 1817, K. B., 6 M. & S. 52).

Keeping a capstan on an artificial harbour in a cove, sufficient consideration

III. RELATIVE TO THE AMOUNT *.

IV. RELATIVE TO THE CONSTRUCTION OF STATUTES †.

V. RELATIVE TO COVENANTS CONNECTED WITH.

FENTON *v.* SWALLOW, T. T. 1834. K. B. 1 *Ad. & E.* 723.

A covenant by a lessee to take less toll than prescribed by act of Parliament is binding.

BY a local act, a toll was imposed upon each horse drawing a carriage, and it contained a proviso, that any horse for which toll had been once paid should be permitted to repass once toll free. It also provided, that the tolls payable in respect of horses drawing any stage-coach should be payable every time of passing; but the trustees, in pursuance of the powers to reduce the tolls under the General Turnpike Act, 3 Geo. 4, c. 126, s. 43, covenanted with the lessee to permit the owners of stage-coaches, waggons, &c., to pass, paying for horses drawing any *such* carriage full toll going, and quarter toll returning at any time during the same day; the Court held, that the lessee was, by his covenant, entitled to demand only quarter toll for horses drawing a stage-coach returning, which had paid before the full toll, although the stage coach was different.

VI. REMEDY FOR.

(*a*) BY ACTION.

1. *Notice of* ‡.

2. *Declaration* §.

for a toll. (*Lord Falmouth* v. *George*, M. T. 1828, C. P., 5 Bing. 286; S. C. 2 M. & P. 457; see Doug. 374).

* Where a person entitled to toll of a commodity, (wheat, for instance), takes more than he is entitled to, an action of trover lies against him for the excess, although the part lawfully taken be mixed up with the excess. (*Norman* v. *Bell*, E. T. 1831, K. B., 2 B. & Ad. 190). The toll of 1*d.* for every pig brought into the market, not unreasonable. (*Wright* v. *Bruister*, T. T. 1832, K. B., 4 B. & Ad. 116).

† An explicit clause is not affected by a subsequent ambiguous one. (*Niblett* v. *Pottow*, T. T. 1834, C. P., 1 Bing. N. S. 81). And where one statute gives certain toll, a subsequent one, without express words, does not take away the toll. (*Rowe* v. *Shilson*, E. T. 1833, K. B., 1 N. & M. 734; S. C. 4 B. & Ad. 726).

Although an extra toll be illegal by the 13 Geo. 3, c. 84, still it is valid under 3 Geo. 4, c. 126, and is not affected by the 4 Geo. 4, c. 95. (*Pickford* v. *Davis*, T. T. 1834, C. P., 1 Bing. N. S. 141).

‡ An action cannot be sustained for tolls improperly demanded and received, unless notice of action be given and the venue laid in the proper county. (*Waterhouse* v. *Keen*, E. T. 1825, K. B., 4 B. & C. 200; abridged ante, *Action*, *Notice of*). See 4 T. R. 553.

§ In an action by the plaintiffs, clerks to the trustees of a turnpike road, (brought under the 55th & 57th sections of the 3 Geo. 4, c. 126, for amending the general laws in being for regulating turnpike roads, &c.), against the defendant, as farmer of the tolls, and his sureties, for non-payment of the rent agreed upon; semble, that the declaration, not alleging that the agreement for the tolls was signed by the trustees letting the said tolls, or any two or more of them, or

3. *Evidence and Witnesses**.

4. *Venire de novo* †.

(*b*) By distress ‡.

VII. RELATIVE TO THE POWER OF JUSTICES §.

Tombstone ||. See, also, tit. *Churches and Chapels.*

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by their clerk or treasurer, and by the one defendant as the lessee or farmer, and by the others as his sureties, or that the said agreement was by deed or under the seals of the trustees, or any one of them, is upon special demurrer, ill, the 57th section of the statute, by which such particularities are required, appearing to be imperative, not merely directory. (*Oldroyd* v. *Crampton*, M. T. 1837, C. P., 4 Bing. N. S. 24; S. C. 2 Scott, 256).

* In an action for tolls and metage, a lease of the office and dues, dated as far back as 1752, and another in 1795, and payment of the dues without interruption from 1772 to 1828, for the admeasurement for ascertaining the custom-house duties, although not performed by the meter, and corporation book shewing the existence of the corporation in 1660:—Held, primâ facie evidence that the corporation and the office were immemorial, and supported the claims for coals not actually meted. Ancient answers of conventionary tenants are evidence; so are declarations of the lord of the manor, as to the extent of his rights, evidence. (*Crease* v. *Barrett*, H. T. 1835, Ex., 1 C. M. & R. 919). The jury must not be told they may presume immemorial right from modern usage. (*Jenkins* v. *Harvey*, M. T. 1835, Ex., 1 C., M. & R. 877; S. C. 5 Tyrw. 326).

In an action for tolls against a party before he became a freeman:—Held, that his having acquired that character after the period to which the action related, did not give him any right to inspect the corporation books; but that, as far as regarded the action, and the subject of it, he was still to be considered a stranger. (*Bristol* (*Mayor, &c.*) v. *Visger*, E. T. 1827, K. B., 8 D. & R. 434).

In an action for the recovery of tolls, a witness is competent to prove for the defendant that he has used the market or right of way, for which the tolls are sought to be recovered, within six years, when no toll was demanded, or, if demanded, payment was refused; although the verdict, if for the plaintiff, may be given in evidence against such witness on a future occasion, in an action for the recovery of the same tolls. (*Lancum* v. *Lovell*, H. T. 1833, C. P., 9 Bing. 465; S. C. 2 M. & Scott, 843).

† In an action for toll traverse on corn brought into R., and then sold and disposed of, the evidence being that the sale was 41½ quarters of wheat in the market-place of R., "by two sacks pitched in the market," and bill of exceptions that there was not sufficient evidence whereon &c.; it appearing that the attention and direction of the learned Judge had been exclusively turned to the evidence which went to establish the existence of the toll, the Court directed a venire de novo. (*Vines* v. *Mayor of Reading*, M. T. 1826, C. P., 4 Bing. 8).

‡ In case for rescous of goods distrained for toll under the authority of a statute, which gives a right to distrain particular goods only, the declaration must shew that the goods taken were such as the plaintiffs were empowered to distrain. But a declaration for pound breach of such goods is sufficient, though it discloses no right of distress. (*Parrett Navigation Company* v. *Stower*, E. T. 1840, Ex., 8 D. P. C. 405).

§ A mere claim of a right to take certain tolls, without shewing clearly that it is a bonâ fide claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. (*Rex* v. *Hampshire Justices*, M. T. 1834, B. C., 3 D. & C. 47).

|| Trespass may be supported against a party wrongfully removing and erasing an inscription from a tombstone by the party erecting it, notwithstanding the freehold is in the parson. (*Spooner* v. *Brewster*, T. T. 1825, C. P., 3 Bing. 136; S. C. 2 C. & P. 34; S. P. 2 Roll. Rep. 140).

Town-Clerk *. See, also, tit. *Corporation.*

Trade. See, also, tits. *Apprentice—Corporation.*

HITCHCOCK *v.* COKER. H. T. 1837. K. B. 1 *N. & P.* 796.

THE defendant, a druggist in the town of T., in consideration of the plaintiff receiving the defendant into his service as an assistant in that trade, at a certain annual salary, covenanted that he would not at any time thereafter directly or indirectly exercise that trade within three miles thereof, under a penalty. On error, in the Exchequer Chamber, the Court held that such restriction was not unreasonable, on account of its being indefinite as to duration, and that the consideration was legal, and of some value; reversing the judgment below.

An agreement not to practise within three miles of a given spot, not restricted as to time, is valid †.

Traberse ‡. See, also, particular titles according to subject-matter.

Treason §. See 5 & 6 Vict. c. 51.

* Office of town-clerk incompatible with his election as a capital burgess. (*Rex* v. *Bond*, T. T. 1825, K. B., 6 D. & R. 333).

† But a contract operating more on restraint of trade than the immediate object of the contract requires is void. (*Horner* v. *Groves*, T. T. 1831, C. P., 7 Bing. 735). Where three persons carrying on a similar trade, and vending their manufactures about the country, entered into an agreement, for their mutual benefit, to confine themselves to certain districts, and that neither should purchase certain articles at O. beyond a certain price; and that if any other persons should set up the same trade, and oppose them, that then they would meet together and enter into such mutual agreement as should be beneficial to their mutual interests, it being their intention not to do any acts prejudicial, but to aid and assist each other in the said trade to the utmost of their power:—Held, that such agreement, not operating as a general restraint of trade, was valid, and that there was on the face of it a sufficient consideration for the partial restraint it contemplated. (*Wickens* v. *Evans*, T. T. 1829, Ex., 3 Y. & J. 318).

‡ By Reg. Gen., H. T. 4 Will. 4, "All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial."

§ *Indictment.*]—The 7 Ann, c. 21, s. 11, requires the delivery of a copy of indictment and list of witnesses, together at one and the same time, ten days before the trial, where the copy of indictment was first delivered, and the list of witnesses at a different time, but both within the prescribed period:—Held, that the proper time for objecting was before plea, so that the trial might be postponed; and that, if not then taken, and the prisoner pleads to the indictment, it is too late to object afterwards (by a majority of the judges). (*Reg.* v. *Frost*, 1839, 2 Moo. C. C. 140).

Evidence.]—To constitute the treason of levying war against her Majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person act as the leader of an armed body, who enter a town, and their object be neither to take the town nor attack the military, but merely to make a demon-

Trees*. See, also, tit. *Fixtures.*

Trespass.

I. RELATIVE TO WHEN OR WHEN NOT MAINTAINABLE, p. 502.

II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE, p. 503.

III. RELATIVE TO THE ACTION FOR.

(*a*) Declaration, p. 504.

(*b*) Pleas.

1. *In general,* p. 505.
2. *When several Pleas allowed,* p. 505.
3. *Not Guilty,* p. 506.

stration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason. In a case of high treason the prisoner is not bound of necessity to shew what was the object or meaning of the said acts done. The offence charged must be made out by those who make the charge. (*Reg.* v. *Frost*, 1839, N. P., 9 C. & P. 129).

List of witnesses.]—Description of witnesses, as of the parish of W., in the borough of W.:—Held sufficient, although the parish extended far beyond the bounds of the borough. (*Reg.* v. *Frost*, 1840, N. P., 9 C. & P. 151; S. C. 2 Moo. C. C. 140).

Jury.]—In treason, the rule is, to call over the panel of jurors as they are alphabetically arranged; but, the attorney-general not objecting, they were allowed to be called by ballot. In challenging, neither party is to be prejudiced by the party having taken the book in his hand without authority, otherwise the taking the book is the commencement of the oath. The right of the Crown to its challenges is not affected by the 6 Geo. 4, c. 50, which is a mere re-enactment of 33 Edw. 1, st. 4. (*Reg.* v. *Frost*, 1839, N. P., 9 C. & P. 136). If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. (*Rex* v. *Collins*, 1832, N. P., 5 C. &. P. 305).

Counsel.]—The Crown cannot recal a witness to contradict matters offered in defence, unless they arise ex improviso, and the fact new, and which the Crown could not foresee, and then the evidence in reply must be confined to such matter only. (*Reg.* v. *Frost*, 1839, 2 Moo. C. C. 140). Counsel may be assigned for a prisoner charged with high treason, upon an application made to the Clerk of the Crown during an adjournment of the commission, between the finding of the indictment and the arraignment; or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried. (*Reg.* v. *Frost*, 1839, N. P., 9 C. & P. 132). The prisoner, in a case of high treason has a right to address the jury in addition to the speeches of his counsel; and semble, that both the prisoner and counsel have a right to address the jury, although there be no evidence on the part of the defence. (*Rex* v. *Collins*, 1832, N. P., 5 C. & P. 305).

* If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown and planted. (*Holder* v. *Coates*, 1827, N. P., 1 M. & M. 112).

III. RELATIVE TO THE ACTION FOR—(*continued*).

4. *Denial of Possession or Goods being the Plaintiff's*, p. 506.
5. *That Goods were encumbering Close, and entry to retake*, p. 506.
6. *Accord and Satisfaction*, p. 507.
7. *Distress, Justification under*, p. 507.
8. *Fi. fa., Justification under*, p. 507.
9. *Liberum tenementum*, p. 507.
10. *License*, p. 508.
11. *Nuisance, abating of*, p. 508.
12. *Son Assault*, p. 508.
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IV. RELATIVE TO THE PETTY TRESPASS ACT, p. 517.

I. RELATIVE TO, WHEN OR WHEN NOT MAITAINABLE.

NEWTON *v.* HARLAND, T. T. 1840. C. P. 1 *Scott, N. S.* 474; S. C. 1 *M. & G.* 644.

Whether the act amounts to a trespass or an indictable forcible entry is a question for the Judge.

IN trespass, plea, that the defendant was lawfully possessed of a dwelling-house, and the plaintiff unlawfully, in the said house, at the said time when &c., justifying the removal of the plaintiff after request &c.; it appearing that plaintiff had been tenant of apartments in the defendant's house, and continuing in possession after the determination of the tenancy by notice to quit, the defendant had turned the wife of the plaintiff out of possession, using no more force than was necessary to compel her to quit the premises—

The Court held, that if the entry of the defendant was with such force as to subject him to indictment for forcible entry, and so his possession obtained by criminal means not lawful, that point ought to have been expressly put and found by the Judge (diss. *Coltman*, J.).

GREGORY *v.* PIPER, E. T. 1829. K. B. 9 *B. & C.* 591.

A party directing an act to be done must be taken to have contemplated all the probable consequences of the act, and be liable for them*.

A MASTER ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall.

The Court held, that the master was liable in trespass, and the defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done; and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against

* Bare possession suffices to maintain trespass against a mere stranger. (*Matson* v. *Cook*, E. T. 1838, C. P., 6 Scott, 179). But where A., before he entered the police force, sent a certificate of his good character, signed by the colonel of the 8th Hussars, to the commissioners of police. On his dismissal from that force, the certificate was returned to the plaintiff, inclosed in a letter signed by the defendant, the certificate being stamped with the words, "Dismissed the police service:" —Held, that, for stamping these words, trespass was not the proper form of action; and also, that this was not evidence to go to the jury that it was done by the defendant, or by his order. (*Taylor* v. *Rowan*, T. T. 1835, N. P., 7 C. & P. 70). So, where a custom-house officer took by force from a passenger, landing from a vessel, a portfolio, containing drawings, without making any previous demand, which was afterwards given back to him:—Held, that the officer was not liable in trespass de bonis asportatis, the goods coming within those enumerated in the

the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequences of his own act he is responsible as a trespasser.

II. RELATIVE TO, BY AND AGAINST WHOM MAINTAINABLE.

Dean *v.* Hogg, M. T. 1834. C. P. 10 *Bing.* 345; S. C. 4 *M. & Scott*, 188; S. C. 6 *C. & P.* 54.

A party who hires a vessel, but the crew belong to the owner, cannot maintain trespass against a person who enters by consent of the latter.*

The defendant hired a vessel from the owner for a day, for the purpose of performing a certain voyage, and entertaining a stipulated number of friends. No change was made with regard to the captain and crew, who, as upon ordinary occasions, performed the duties of the vessel.

The Court held, that, under the circumstances, the defendant had not such a possession of the vessel as justified the forcible expulsion of a stranger who had come on board by the permission of the captain.

schedule to 3 & 4 Will. 4, c. 56, as liable to forfeiture. But semble, per Lord *Denman*, he would have been liable in trespass to the person, unless fraud or some attempt at concealment had been shewn. (*De Gondouin* v. *Lewis*, E. T. 1839, Q. B., 10 Ad. & E. 117; S. C. 2 P. & D. 283).

* So, a landlord cannot maintain trespass for cutting down trees not timber. (*Channon* v. *Patch*, T. T. 1826, K. B., 5 B. & C. 897; S. C. 8 D. & R. 651). So, one tenant in common cannot sue another in trespass for the breaking and entering a close, of which they were owners. (*Noye* v. *Reed*, M. T. 1827, K. B., 1 M. & R. 63). But a remainderman, after entry, may maintain trespass against a party who has wrongfully intruded and retained possession. (*Butcher* v. *Butcher*, M. T. 1827, K. B., 7 B. & C. 399; S. C. 1 M. & R. 220). An action of trespass cannot be maintained by one tenant in common of a party-wall against the other. Nor does the altering of such a wall for the purpose of improvement (for instance the heightening of it) render the party who makes the alteration a trespasser, though he may be liable to an action on the case. (*Cubitt* v. *Porter*, E. T. 1828, K. B., 8 B. & C. 257).

A private owner may sue servants of a water company, who take up pavement belonging to him. (*Scales* v. *Pickering*, H. T. 1827, C. P., 4 Bing. 448; S. C. 1 M. & P. 194). A sailor, who had lodged for some weeks at a public-house, and also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, and there, after drinking some spirits, became intoxicated and fell asleep. The father of the publican, in his son's presence, desired a young woman, an acquaintance of the sailor, to take the money out of his pocket, which she did, and laid it on the table. It was 13*l.* 17*s.* 6*d.* The publican took it up and said, he would keep it till the man got sober. The father told her to say when the sailor awoke, that his money was lost. The publican said she had better be there in the morning when he settled with the sailor. When he awoke he asked for his money, the father said it was all right till the morning. After this, by desire of the sailor, a pound in silver was given to the young woman out of the money, and the next morning, on his applying for the remainder, he was offered two shillings and some copper as the balance, after deducting what he owed the publican:—Held, that a joint action of trespass was maintainable against both the publican and his father, and that the sailor was entitled to recover the whole amount taken from him, without any other deduction than that of the pound afterwards given to the woman. (*Peddell* v. *Rutter*, M. T. 1837, N. P., 8 C. & P. 337).

Subsequent assent to a trespass will not make the assenting party a co-trespasser, unless the trespass was committed for his benefit. (*Wilson* v. *Barker*, E. T. 1833, K. B., 1 N. & M. 409).

III. RELATIVE TO THE ACTION FOR.

(*a*) Declaration.

SMITH *v.* SMYTH, H. T. 1834. C. P. 10 *Bing.* 406; S. C. 4 *M. & Scott,* 180.

The Court cannot say that there is no place in Middlesex called London*.

THE plaintiff in his declaration alleged that defendant committed the trespass complained of with force and arms, to wit, in the county of Middlesex, in a certain room and apartment of the plaintiff, in and parcel of a certain dwelling-house situate and being in London. On special demurrer upon the ground, that though an action in itself local was brought in Middlesex, yet the circumstance in which such action originated was said to have taken place in London:—Held, that the Court was not obliged to notice judicially that there might not be such a place as London in Middlesex; consequently, the action was well brought, and the demurrer should be overruled.

LEMPRIERE *v.* HUMPHREY, E. T. 1835. K. B. 4 *N. & M.* 638.

No question can be raised as to abuttals under the plea of liberum tenementum†.

THE declaration in trespass described the close, in which &c., by abuttals on the four cardinal points respectively, towards certain places, to which the defendant pleaded liberum tenementum, on which issue was joined; the Court held, that the defendant was bound by the description in the declaration, which he had adopted and justified under it; and the defendant having proved his possession of a close also corresponding with the same abuttals, could not, upon such a state of pleading, raise an objection to the generality or uncertainty of the plaintiff's description, but would be in the same situation, as if the plaintiff had set out a correct description of his close, either by abuttals or by name.

* The statement of the use made of a close is surplusage. (*Dukes* v. *Gostling*, E. T. 1835, C. P., 1 Bing. N. S. 588; S. C. 1 Scott, 570.

A declaration, which substantially complains of a wrong, properly the subject of an action of trespass, is good after verdict, though it contained no allegation of vi et armis, and is framed in case for consequential damage. (*Hudson* v. *Nicholson*, T. T. 1839, Ex., 5 M. & W. 437.

† By Reg. Gen., H. T. 4 Will. 4. In an action of trespass, quare clausum fregit, the close or place, in which &c., must be designated in the declaration by name or abuttals, or other description; in failure whereof the defendant may demur specially.

A strip added to a close may be called by the name of the close. (*Brownlow* v. *Tomlinson*, T. T. 1840, C. P., 8 D. P. C. 827; S. C. 1 Scott, N. S. 426; S. C. 1 M. & G. 484). Where a plaintiff complains of a trespass in a close, which he names and describes by metes and bounds, and the defendant pleads a justification as to the trespass in the close, "in which &c.," such expression, "in which &c.," means not the whole close, but the spot in which the trespass was committed, and the plea will be proved, if the justification proved apply to that spot, although it do not extend to the whole of the close. (*Bassett* v. *Mitchell*, H. T. 1831, K. B., 2 B. & Ad. 99). A declaration, which alleges that A. B. broke and entered the dwelling-house of the plaintiff, and made a disturbance therein, and broke open a part of the leads and roof of the said dwelling-house, is not supported by proof of breaking an external rail-fence, and trespassing on leads, forming the roof of a counting-house occupied by A. B., but used as an easement to the house of the plaintiff. (*Mudie* v. *Bell*, H. T. 1828, N. P., 3 C. & P. 331).

(*b*) Pleas.

1. *In general.*

M'Curdy *v.* Driscoll, E. T. 1833. Ex. 1 *C. & M.* 618; S. C. 3 *Tyrw.* 571.

The pleas must cover the several trespasses laid*.

In trespass, to a declaration containing counts for several assaults, &c., each plea going to the whole declaration, shewed only a justification on one occasion.

The Court held the plea insufficient, as not covering the several trespasses laid.

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2. *Several Pleas, when allowed.*

Neale *v.* M'Kenzie, T. T. 1834. Ex. 1 *C., M. & R.* 61; S. C. 4 *Tyrw.* 670.

Not guilty, and a justification as landlord under a distress, not allowed†.

In trespass for breaking and entering the plaintiff's dwelling-house, and seizing goods, &c., rule to plead not guilty, and a justification as landlord under a distress for rent.

The Court will not allow the defendant to plead the general issue, and a special plea of justification, where a statute entitles him to give matters of justification in evidence under the general issue.

* If they do not, though one issue be found for the defendant, plaintiff will be entitled to a verdict. (*Bush* v. *Parker*, T. T. 1834, C. P., 1 Bing. N. S. 72).

Where a right is founded on an exception, it cannot be pleaded as a reservation. (*Fancy* v. *Scott*, E. T. 1828, K. B., 2 M. & R. 335). To a declaration in trespass for an assault, a plea, justifying in defence of the defendant's dwelling-house, with a quæ est eadem &c., and a traverse of any other place than the said dwelling-house, is bad on special demurrer, as the traverse is unnecessary. (*Hembro* v. *Bailey*, M. T. 1832, Ex., 1 C. & M. 204; S. C. 3 Tyrw. 153). In trespass to a building and close, it is a good justification that the building belonged to the defendant, and that he removed the goods of the plaintiff, which were encumbering it, to the said close of the plaintiff adjoining thereto, the same being a convenient place for depositing them. (*Rea* v. *Sheward*, E. T. 1837, Ex., 2 M. & W. 424).

An excise officer may re-take the possession of goods by force from a person wrongfully refusing to deliver them up. (*Rex* v. *Milton*, T. T. 1827, N. P., 1 M. & M. 107).

† In trespass quare clausum fregit, the defendant pleaded, 1st, not guilty; 2nd, that the plaintiff was not possessed; 3rd, that defendant was seised in fee; 4th, that A. B. was seised in fee, and that the defendant by his command committed the trespass complained of, &c. A summons having been taken out to strike out the third and fourth pleas, the Judge refused to make any order, whereupon an application for that purpose was made to the Court of Exchequer:—Held, that the third and fourth pleas might be pleaded together with the second, as they were not necessarily founded on the same ground of answer or defence, within R. G., H. T. 4 Will. 4, s. 6. (*Morse* v. *Apperley*, H. T. 1840, Ex., 6 M. & W. 145; S. C. 8 D. P. C. 203). In an action of trespass, the Court refused to allow the defendant to plead the pleas of not guilty, and payment of money into Court, to the whole action, but directed either that the latter plea should be confined to so much only of the cause of action as was intended to be admitted, or should be struck out. (*Thompson* v. *Jackson*, E. T. 1840, C. P., 8 D. P. C. 591; S. C. 1 Scott N. S. 157). And in trespass, where a defendant may give the matter of justification in evidence under the general issue, he will not be allowed to plead the general issue, and also a special plea of justification. (*Neal* v. *Mackenzie*, T. T. 1834, Ex., 1 C., M. & R. 61; S. C. 2 D. P. C. 702; see, also, tit. *Statute*.

3. *General Issue*.*

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4. *Denial of Possession or Goods being the Plaintiff's.*

FLEMING *v.* COOPER, T. T. 1836. K. B. 5 *Ad. & E.* 221.

Plea denying the possession should conclude to the country†.

PLEA, in trespass for breaking, &c. closes of and belonging to the plaintiff, denying that plaintiff, at the said times when &c., was possessed of the said closes in manner &c., and concluding to the country.

The Court held the conclusion right.

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5. *That Goods were encumbering Close* ‡, *and entering to re-take* §.

PATRICK *v.* COLERICK, E. T. 1838. Ex. 3 *M. & W.* 483.

Defendant may plead that he

PLEA, in trespass for entering plaintiff's close, that plaintiff had entered defendant's close, and seized goods against his will, and

* By Reg. Gen., H. T. 4 Will. 4, in actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially. In actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant's having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein. The plea of not guilty does not put in issue the inducement. (*Dukes* v. *Gostling*, E. T. 1835, C. P., 1 Bing. N. S. 588 ; S. C. 1 Scott, 570). And, in trespass against ten defendants for breaking the house of A., and taking his woollen yarn, the defendants may, under the general issue, shew that the yarn was afterwards condemned under the stat. 17 Geo. 3, c. 56, in order to make out that A. could have no property in it ; but the condemnation of the yarn, unless the parties had a search-warrant, will not justify the entering of a house. (*Davies* v. *Nest*, 1833, 6 C. & P. 167). To an action of trespass brought by the mortgagor in possession against the mortgagee, for breaking and entering the premises, and taking away the corn and other produce, the defendant may give his legal title as mortgagee in evidence under the general issue, although the mortgage is for a term and not in fee. (*Johnson* v. *Hewson*, E. T. 1828, K. B., 2 M. & R. 227). But a defence, that injury did not arise from default of defendant, must be pleaded. (*Cotterill* v. *Starkey*, M. T. 1838, N. P., 8 C. & P. 691). And in trespass:—Held, that, under the general issue, the defendants could not shew, in mitigation of damages, that they acted under the landlord against whom an action had been brought, and that damages were obtained for the same trespass. (*Day* v. *Porter*, 1837, N. P., 2 M. & Rob. 151). Mere possession in the plaintiff being enough against a wrong-doer, upon plea of not guilty, and that the goods were not the property of the plaintiff :—Held, that the defendant could not set up property in a stranger under whom he did not justify the act complained of. (*Carter* v. *Johnson*, 1837, N. P., 2 M. & Rob. 263).

† A denial of house or goods being plaintiff's is divisible. (*Routledge* v. *Abbott*, Q. B., 3 N. & P. 560).

The word "close" in a plea may denote interest as well as possession. (*Heath* v. *Milward*, T. T. 1835, C. P., 2 Bing. N. S. 98).

‡ If, in trespass for taking goods, the defendants plead that W. L. was possessed of a room, and that they, as his servants, removed the goods, which were encumbering the room, to a convenient distance, this plea is disproved, if it be shewn that the defendants locked up the goods in the room and took away the key. (*Jones* v. *Lewis*, 1836, N. P., 7 C. & P. 343).

§ Plea, in trespass for breaking and entering plaintiff's close, that the defendant was the owner of certain goods, &c., on the premises, (not shewing how they came there), and that he entered for the purpose of taking them, doing no unnecessary damage :—Held, bad on demurrer. (*Anthony* v. *Haney*, T. T. 1832, C. P., 8 Bing. 816 ; S. C. 1 M. & Scott, 300).

placed them on the close in the declaration mentioned, and that the defendant made fresh pursuit, and entered to re-take the goods—

entered the close to re-take his own goods.

The Court held, a good plea, the plaintiff giving an implied license to enter for the purpose of re-caption.

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6. *Accord and Satisfaction.*

THURMAN *v.* WILDE, H. T. 1840. Q. B. 3 *P. & D.* 289.

IN an action of trespass qu. cl. fr., the defendants pleaded that they acted as servants of B.; that they delivered up possession of the close to him, and that he afterwards, with the consent of the defendants, made satisfaction to the plaintiff, which was accepted.

Accord and satisfaction pleadable by a co-trespasser, though made by another.

The Court held, that, whether or not satisfaction from a stranger could be pleaded, it appeared from the plea in this case that B. was a co-trespasser, so as to be able to make a satisfaction which should enure to the benefit of the defendants, and that, therefore, the averment of their consent to his so making satisfaction was immaterial; and that a replication which tendered issue upon such consent was bad on special demurrer.

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7. *Distress, Justification under* *.

8. *Fi. fa., Justification under* †.

9. *Liberum Tenementum* ‡.

* A plea justifying seizure, because goods fraudulently removed, should be confined to the breaking and entering the premises. (*Fletcher* v. *Marillier*, H. T. 1839, Q. B., 1 P. & D. 354).

† In trespass for breaking and entering a dwelling-house and taking plaintiff's goods, the defendants pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed of the dwelling-house; 3rdly, that the goods were not the property of the plaintiff; 4thly, as to the trespass to the house, that a fi. fa. issued against a third party, whose goods were in the plaintiff's house; and the defendants justified the entry to seize those goods under the sheriff's warrant; to which the plaintiff replied, admitting the writ and the warrant, de injuriâ suâ absque residuo causæ. On the trial, the plaintiff proved that he was in possession of the house and goods at the time of the trespass, and also gave evidence of a conveyance thereof from the execution debtor to him; but the jury found that it was not a bonâ fide conveyance. The defendants gave no evidence, the Judge ruling that the seizure under the writ and warrant was admitted by the plaintiff's replication:—Held, that it was not admitted, and that it was incumbent upon the defendants to prove their connexion with the writ and warrant, otherwise they would appear to be wrongdoers, and the possession of the house was sufficient proof of title in the plaintiff in respect of the house. (*Carnaby* v. *Welby*, H. T. 1838, Q. B., 1 P. & D. 98).

‡ The plea of liberum tenementum is divisible. (*Phythian* v. *White*, H. T. 1836, Ex., 4 D. P. C. 714; S. C. 1 M. & W. 216).

Alleging close to be soil and freehold suffices, without averring a seisin in fee. (*Wilkinson* v. *Malin*, T. T. 1832, Ex., 2 C. & J. 636; S. C. 2 Tyrw. 544). In trespass for breaking plaintiff's close and grubbing up a hedge, pleas, the general issue and liberum tenementum:—Held, that, under the latter plea, the defendant could not give evidence of a tenancy in common; and although a mere exercise of right of ownership over a common, as clipping the hedge, might be given in evidence under the general issue as a justification, yet a complete removal and destruction of it could not. (*Voyce* v. *Voyce*, 1820, N. P., 1 Gow, 201).

10. *License**.

11. *Nuisance, Abatement of* †.

12. *Son Assault* ‡.

13. *Tender of Amends.* See post, div. *Replication*, p. 510.

14. *Peace, to preserve* §.

* In trespass quare clausum fregit, on several days, pleas, leave and license to the whole. If some of the trespasses were committed after the license was revoked the plaintiff need not new assign, as the defendant by his plea undertakes to prove a license sufficient to cover all the acts of trespass. If the plaintiff is tenant of A., and has agreed that A. shall give three persons license to sport over the lands, and the defendant has such a license from A., such a license will not support the plea of leave and license by the plaintiff. (*Hayward* v. *Grant*, 1824, N. P., 1 C. & P. 448). In trespass quare clausum fregit, the defendant pleaded that he and the occupiers of a certain house had for twenty years enjoyed as of right a certain way "from a certain highway over the plaintiff's close, in which &c., to the defendant's house and back." The replication alleged that the defendant &c. had enjoyed the said way &c. by leave and license. It was proved that the defendant &c had a right of way over the plaintiff's close to the highway, and across it to a field of the defendant's on the other side, and that it was a way over the plaintiff's close, and the highway was never used for any other purpose than to get to the field on the other side; this was done by the plaintiff's license:—Held, that a right of way to or from a highway is a right to go to or from it, and to or from each and every place beyond it to which it leads, and that, as the license here pleaded was proved not to extend to the whole of such right, the replication failed. (*Colchester* v *Roberts*, H. T. 1839, Ex., 4 M. & W. 769). Where a distress was put into the plaintiff's premises for rent on the 13th, and on the fifth day after (the 18th) the plaintiff entered into an agreement, whereby, in consideration of the landlord giving her the furniture distrained for rent, she undertook to give possession of the premises on or before one week from the date thereof, that was by the 25th:—Held, that such agreement amounted to leave and license, which covered the alleged trespasses of breaking and entering, stopping chimneys, taking keys, &c., committed after the 25th. Held, also, that such license, being acted upon by the plaintiff's selling some of the furniture, and allowing the new tenant to work in the garden, and being also coupled with an interest, was not revocable, or, at all events, that such revocation, if relied on, should have been pleaded. (*Feltham* v. *Cartwright*, T. T. 1839, C. P., 7 Scott, 695; S. C. 5 Bing. N. S. 569). On pleas in trespass, claiming the enjoyment as of right of a privilege of entering on plaintiff's land for the purpose of cleaning and repairing the banks of a mill stream—Held, that, to prove such right merely permissive, the plaintiff might shew a former lease, to plaintiff's predecessor, giving the privilege during the term, without replying it specially, under 2 & 3 Will. 4, c. 71, s. 5. (*Clay* v. *Thackrah*, M. T. 1839, N. P., 9 C. & P. 47; S. C. 2 M. & Rob. 244).

† A stack of chimneys belonging to a house close to a highway, which by reason of a fire were in immediate danger of falling on the highway, were thrown down by some firemen:—Held, that they were justified in so doing, and were not answerable for damages unavoidably done to an adjoining house of a third person. (*Dewey* v. *White*, H. T. 1827, N. P., 1 M. & M. 56).

‡ In a plea of son assault demesne, the allegation, "before the said time when &c.," sufficiently confesses the assault in the declaration. (*Wise* v. *Hodsoll*, E. T. 1840, Q. B., 11 Ad. & E. 816; S. C. 3 P. & D. 510).

§ Where a police officer, although not present at any assault, afterwards, on the renewal of threats to break into a house, forcibly took the plaintiff into custody at the defendant's instance, and in an action for the assault and false imprisonment, the defendant pleaded the previous violence, and that he was forced and obliged, "in order to preserve the peace," to give the plaintiff in charge:—Held, that such plea was good after verdict. (*Ingle* v. *Bell*, E. T. 1836, Ex., 1 M. & W. 516; S. C. 1 Tyrw. & G. 801).

15. *Mesne Profits, to Action of* *.

16. *Debt, going to demand* †.

17. *Wife, to re-take Possession of* ‡.

18. *Certificate by Magistrate* §.

19. *Justifying under Mortgagee* ‖.

(*c*) NEW ASSIGNMENT ¶.

* In trespass for mesne profits of manors, tithes, &c., pleas denying the plaintiff's possession, and liberum tenementum in the defendant (the expulsion being laid on 10th July, 1826) up to the commencement of the action (1837); to which pleas the plaintiff, by way of estoppel, replied a judgment in ejectment by plaintiff on the demise of S. against the defendant; two demises were laid, one on the 10th July, 1826, for fourteen years, and another on 26th December, 1831, for seven years, with a single ouster on 27th December, 1831; but no possession appeared to have been given under the judgment, and the plaintiff in fact had not the possession:—Held, that the first plea, being pleaded to the whole declaration, was to be taken to deny any such possession in the plaintiff as was necessary for his bringing the action at all, viz. a demise of a possession at the time the alleged trespass was committed, which, by the record, appeared to be from 10th July, 1826, to the time of ouster; the plea and the replication, therefore, were inconsistent to that extent with the judgment set out in the replication; that the defendant was not estopped from pleading it, and that the first plea was sufficiently answered. Held, also, that the second plea, being pleaded in answer to a possessory action, admitted such a possession as if unanswered, or as against a wrong-doer, would suffice to maintain the action; and, there being nothing inconsistent in an allegation of freehold, and the recovery of a term of years, the replication was also good by way of estoppel to that plea; and, lastly, a rejoinder to both that a writ of error on the judgment was pending in the House of Lords, did not destroy the effect of the estoppel on the pleas. (*Doe* v. *Wright*, M. T. 1838, Q. B., 2 P. & D. 691).

† Semble, that, in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff (who went to demand a debt) was there making a great disturbance, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad. (*Wheeler* v. *Whiting*, 1840, N. P., 9 C. & P. 262).

‡ In an action of trespass, defendant may plead a justification, that the defendant entered the plaintiff's house to reclaim his wife, who was wrongfully harboured there, and a deed of separation of the defendant and his wife is admissible in evidence if executed by the defendant, although not executed by either of the trustees. (*Lewis* v. *Ponsford*, M. T. 1838, N. P., 8 C. & P. 687).

§ In trespass for assault and battery, plea, that defendant had been discharged by the certificate of two magistrates under 9 Geo. 4, c. 31, ss. 27, 29—Held bad, if it does not set out the grounds of the dismissal. (*Skuse* v. *Davis*, T. T. 1839, Q. B., 2 P. & D. 550; S. C. 7 D. P. C. 771).

‖ A plea justifying an entry under a mortgagee must shew a request. (*Watson* v. *Waltham*, H. T. 1835, K. B., 4 N. & M. 537).

¶ Trespass. Pleas, first, not guilty; second, a justification. Replication and new assignment. Demurrer to replication and new assignment; 15*l.* damage on first issue, and nominal damages on second. The plaintiff entered a nol. pros. to the new assignment, and gave defendant judgment on demurrer; the Court set aside the nol. pros. (*Strother* v. *Randerson*, M. T. 1836, B. C., 5 D. P. C. 280). In trespass for arrest and false imprisonment, pleas, a judgment and the taking in execution thereon; replication, new assigning another and different arrest, &c., than that justified:—Held, that, although it was not essentially necessary to prove two arrests, and that it might be sufficient to prove an arrest different in its circumstances from the one pleaded, yet, where the facts shewed the arrest to have been founded on the same writ, the same having been only altered in consequence of part payment, the jury might presume it to be the same arrest. (*Darby* v. *Smith*, 1837, N. P., 2 M. & Rob. 184).

(*d*) Replication.

VIVIAN *v.* JENKINS, T. T. 1835. K. B. 5 *N. & M.* 14.

Where title is put in issue by the plea, de injuriâ is a bad replication*.

TRESPASS for breaking and entering a close, and breaking to pieces windlasses and other machinery; second count, for damaging and destroying windlasses, &c. Plea, amongst others, justifying and deducing title to the close in which &c.; and because the machinery, in the first and second count mentioned, was incumbering the said close, in removing the same a little broke to pieces, &c. The plea contained no averment of identity of the goods in the first and second count. To this plea the plaintiff replied, to so much as relates to the trespass in the first count &c., non dimisit; and, as to part of the trespass to the goods in the second count, de injuriâ, and as to other part, excess in removing.

The Court held, that there was no objection in point of law to the plaintiff replying de injuriâ as to the part relating to the goods, and excess as to the rest; but that, as the defendants had here pleaded title, although it would have been sufficient for them to have relied upon possession, the replication de injuriâ was in this case bad; but, as it was to be taken as several replications to several pleas, that did not render the whole replication bad.

(*e*) Rejoinder.

MORROW *v.* BELCHER. M. T. 1825. K. B. 4 *B. & C.* 704; S. C. 7 *D. & R.* 187.

Where there is a justification by one of several,

THE plaintiff declared in trespass against three persons. They all pleaded the general issue, and one of them also pleaded a justifica-

* De injuriâ is a good replication to a justification in defence of possession. (*Piggott* v. *Kemp*, M. T. 1832, Ex., 1 C. & M. 197; S. C. 3 Tyrw. 128). Trespass for breaking the plaintiff's close, and removing him from his possession. The plea stated a seisin of the close in question of two persons of the name of West, and a demise to James Hedger and Thomas Griffith in June, 1791, for ninety years, an entry by them, the death of Griffith, "whereby James Hedger became sole possessed for the remainder of the term, the making of James Hedger's will, to wit, on the 21st of November, 1812, his bequest of the term to William Hedger, and the death of James Hedger so possessed of the term, to wit, on the 17th of January, 1820, the proof of his will, and the assent of the executors to the bequest of the term, whereby William Hedger became possessed of the close for the remainder of the term, and being so possessed, the plaintiff, under colour of an earlier devise, entered, upon which entry the defendant, as servant of William Hedger, entered. Replication, that the entry was after the act of 3 & 4 Will. 4, c. 27; and that the right of entry did not first accrue to William Hedger, or the defendant, "at any time within twenty years next before the making of such entry." Rejoinder, that, at the time of passing of the said act, the close was not possessed by the plaintiff, or any other person, adversely to the right or title of William Hedger, or those through whom he claimed, and that he made an entry within five years after the act passed. Surrejoinder, that the possession at the time of the act was adverse, and, was then possessed, to wit, by one William Thickle, adversely to the alleged right and title of William Hedger:—Held, that the dates in the plea, being under a videlicet, were not material, and that therefore the title of William Hedger up to the year 1820, when James Hedger died possessed of the term, and it came to William Hedger, was not admitted by the replication, which was therefore not contradictory in stating that his title did not first accrue within twenty years of the passing of the act of Parliament. (*Holmes* v. *Newlands*, M. T. 1839, Q. B., 3 P. & D. 128).

The replication to a plea of tender of amends should either deny the tender or the sufficiency. (*Williams* v. *Price*, T. T. 1832, K. B., 3 B. & Ad. 695).

tion. The plaintiff joined issue, and in his replication traversed the justification. All the defendants rejoined to that replication.

The Court held, that the rejoinder was bad in law.

a replication applicable to all, and a rejoinder applicable to all, is bad on special demurrer*.

(*f*) Evidence.

1. *In general* †.

2. *For Plaintiff* ‡.

* In an action of trespass, the defendant pleaded liberum tenementum, and leave and license. The plaintiff denied the license, and replied to the other plea a tenancy from year to year, commencing on the 16th of November, 1836. The defendant, in his rejoinder, denied the demise. There was evidence that the 16th of November was the first day of each year of the tenancy; but from the evidence it seemed that the tenancy must have commenced before 1836. The defence (which was sought to be proved by an admission of the plaintiff) was, that, at the time of the letting, the plaintiff had agreed to give up the possession whenever the defendant required to have the land:—Held, that the allegation of the tenancy was proved, although the tenancy had begun on some 16th of November several years before 1836, as a tenancy from year to year is considered as recommencing every year. (*Tomkins* v. *Lawrence*, 1839, N. P., 8 C. & P. 729).

† In an action for shooting a dog, brought against the owner of a plantation and his gamekeeper, it appeared, that, in the plantation in which the dog was shot, there was fixed on a pole a board, on which was painted, "All dogs found trespassing on this plantation will be shot:"—Held, that a copy of that which was painted on the board might be given in evidence, without notice to procure the original board. (*Bartholomew* v. *Stephens*, 1839, N. P., 8 C. & P. 728).

In an action of trespass A. claimed the whole bed of a river which ran between his farm and that of B.:—Held, that he might give in evidence acts of ownership done by him in and on the bank of the same river above and below B.'s farm, and opposite to his own land. (*Jones* v. *Williams*, H. T. 1837, Ex., 2 M. & W. 327). A claim of a general right in the tenants and occupiers of a messuage to fasten lines and hang linen over the close of the defendant is not supported by proof of a right in the tenants and occupiers of the messuage to fasten lines and hang linen thereon, for the private and domestic purposes only of such tenants and occupiers. (*Drewell* v. *Towler*, T. T. 1832, K. B., 3 B. & Ad. 735). Although in opening a case reference is made to a warrant, still, if the act be primâ facie illegal, the defendant must produce and prove the warrant. (*Holroyd* v. *Doncaster*, E. T. 1826, C. P., 3 Bing. 492).

In an action for an assault, the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol, loaded with gunpowder, ball, and shot, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty; and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin, and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that if the defendant was not quiet he would blow his brains out:—Held, that if the defendant, at the time he presented the pistol, used words, shewing that it was not his intention to shoot the plaintiff, this would be no assault. Held also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that, unless the jury were satisfied that the pistol was loaded, they ought to find for the defendant. (*Blake* v. *Barnard*, T. T. 1840, N. P., 9 C. & P. 626). To prove the extent of a manor, formerly one of the possessions of the Duchy of Lancaster, a document was tendered in evidence, which was produced from the duchy-office, and purported to be a survey of the manor taken in the reign of Queen Elizabeth, before the manor ceased to belong to the duchy, by a deputy of the general surveyor of the duchy, upon the oath and presentment of the tenants of the manor. No commission or authority for taking the survey was produced:—Held, that it was not admissible, either as an authorized survey, or on the ground of reputation. (*Evans* v. *Taylor*, H. T. 1838, Q. B., 3 N. & P. 174).

‡ In trespass and expulsion against three, with a count for imprisonment, the expulsion having been proved against the three defendants, the plaintiff's counsel went into evidence of the imprisonment, but that appeared to have been by one

3. *For Defendant* *.

(*g*) Witnesses.

Paddock *v.* Fradley, T. T. 1830. Ex. 1 *C. & J.* 90.

A party under whom defendant justifies is a competent witness for him, when under no contract to indemnify †.

In trespass for taking marl, &c., the defendants justified as under a license from plaintiff to one defendant and J. F., and as to the other defendant, as their servant; in support of which they produced an agreement between the plaintiff and the first defendant and J. F., for a surrender to them of "all those brick-works at S.," then in the possession of the said plaintiff, upon which the question arose, whether the locus in quo was parcel of such brick-works.

The Court held, that, in the absence of any engagement on the part of J. F. to indemnify the defendants, he was a competent wit-

of the defendants only:—Held, that the plaintiff's counsel could not abandon the first trespass proved against all three, and go on with the case as to the imprisonment by the one defendant alone. (*Tait* v. *Harris*, T. T. 1833, N. P. 6 C. & P. 73; S. C. 2 M. & Rob. 283). On issue joined upon a plea of not possessed, in trespass quare clausum fregit, defendant may use as evidence the deposition of a witness formerly called by plaintiff to prove his possession, in a proceeding before justices, for an alleged trespass in the same close. It makes no difference that the witness is still alive. (*Cole* v. *Hadley*, E. T. 1840, Q. B., 11 Ad. & E. 807; S. C. 3 P. & D. 458; see *Monks* v. *Dykes*, H. T. 1839, Ex., 4 M. & W. 567). Where, in trespass against several, the plaintiff proved acts by two defendants only on one day, and acts by all on another day:—Held, that the plaintiff, although he had elected to rely on the former trespasses, might prove also other trespasses against those two, but could not recover as against them for trespasses in which they were implicated with others. (*Hitchen* v. *Teale*, 1836, N. P., 2 M. & Rob. 30). In trespass against three defendants for false imprisonment of plaintiffs—Held, that declarations of one, relative to the trespass, stating that it arose from malice, though made in the absence of the others, were admissible. (*Wright* v. *Court*, 1825, N. P., 2 C. & P. 232).

* Where the plea in trespass for taking pigs alleged the defendant's possession of a close called H., and that the pigs were wrongfully in the same, doing damage, and replication denying that the defendant was possessed of the said close in the plea mentioned in which &c., upon which issue was joined:—Held, that it was not enough for the defendant to shew that he was possessed of a close called H., but of a close in which the pigs were doing damage. (*Bond* v. *Downton*, M. T. 1834, K. B., 2 Ad. & E. 26). In trespass for taking a pianoforte, which the plaintiff had bought of L., the defendant pleaded that it belonged to him, and had been feloniously stolen from him by L., and that he re-took it:—Held, that, whatever would be evidence against L., if he were on his trial for the felony, is evidence in this action to prove the felony to have been committed by L. The case being opened that L. had committed the felony by hiring the pianoforte and selling it immediately—Held, that the defendant could not give evidence respecting optical instruments, which were alleged to have been obtained by L. from another tradesman. (*Wilton* v. *Edwards*, M. T. 1834, N. P., 6 C. & P. 677).

† In trespass, the issue being, whether the plaintiff, or a party under whom the defendant claimed, was entitled—Held, that such party was a competent witness for the defendant, as the verdict would not change the possession; aliter, in ejectment. (*Rees* v. *Walters*, E. T. 1838, Ex., 3 M. & W. 527). But one defendant in trespass, against whom some primâ facie case has been made by the plaintiff, is not entitled to have his case put separately to the jury, in order to his being acquitted and becoming a witness for the other defendants, however clear the exculpatory evidence on his part may be. (*Leach* v. *Wilkinson*, 1836, N. P., 1 M. & Rob. 537). If an action be brought against six, for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct the other three to be acquitted till all the evidence for the defence is gone through. (*Wynne* v. *Anderson*, 1829, N. P., 3 C. & P. 596).

ness, and that he might be called to explain the agreement by parol evidence, it being ambiguous as to the identity of the brick-grounds.

(*h*) Proceedings at the trial*.

(*i*) Damages†.

(*j*) Verdict.

Stockdale *v.* Chapman, H. T. 1836. K. B. 4 *Ad. & E.* 419; S. C. 6 *N. & M.* 711.

It is too late after verdict to object, to the replication to a plea of license, that no similiter was added‡.

In trespass, to a replication to a plea of leave and license, concluding to the country, no similiter was added, nor was there any &c. at the end thereof.

The Court, after verdict, refused to grant a new trial for want of the similiter; the question of leave and license having in fact been involved in the other issues, and no objection having been made to the omission before verdict.

* Where the only plea was justifying taking the goods under a fiat in bankruptcy —Held, that the defendant was entitled to begin. (*Cotton* v. *James*, M. T. 1829, N. P.; 1 M. & M. 273; S. C. 3 C. & P. 505; S. P. *Fish* v. *Travers*, H. T. 1829, N. P., 3 C. & P. 578). So, where a justification only is pleaded, the question of damages does not arise until the issue has been tried; the defendant, therefore, has a right to begin. (*Bedell* v. *Russell*, T. T. 1825, N. P., 1 R. & M. 293). And where in trespass there was no general issue, but the defendant pleaded liberum tenementum, and several pleas claiming rights of way, which the plaintiff traversed:—Held, that, the former plea being in the affirmative, the defendant was entitled to begin. (*Pearson* v. *Coles*, 1832, N. P., 1 M. & Rob. 206). In trespass for taking goods, which, in one plea, the defendants justified, on the ground of their having been fraudulently removed to avoid distress:—Held, that the plaintiff might reserve his answer in reply. (*Ashmore* v. *Hardy*, 1836, N. P., 7 C. & P. 501).

† The costs of an application to set aside a judgment for irregularity, which was granted without costs, cannot be recovered by way of aggravation of damages in an action of trespass for seizing goods under colour of such judgment. (*Loton* v. *Devereux*, H. T. 1832, K. B., 3 B. & Ad. 343). To a count for an expulsion A. pleaded not guilty, and B. and C. paid 20*s.* into Court, and pleaded that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages. The jury wished to find a verdict for the plaintiff against A. for 20*l.* beyond the sum paid into Court, and a verdict that 20*s.* as to B. and C. was sufficient:—Held, that this could not be done; and that, if the jury thought that A. was guilty, and that the damages the plaintiff had sustained did not exceed 20*s.*, they should find a verdict against A., with nominal damages only, and a verdict in favour of C. and D.; but, if the jury thought the damages that the plaintiff had sustained exceeded 20*s.*, they should find a verdict against all the defendants, for so much as the plaintiff's damages exceeded that sum. (*Walker* v. *Woolcott*, H. T. 1838, N. P., 8 C. & P. 352).

‡ If the defendant's pleas do not cover the whole, the plaintiff is entitled to the verdict. (*Neville* v. *Cooper*, M. T. 1834, Ex., 2 C. & M. 329). To trespass for pulling down the plaintiff's wall, which was set out by abuttals, the defendant pleaded, secondly, that the wall was not the wall of the plaintiff; and, fourthly, that it was a party-wall; both of which issues the jury found for the defendant: —Held, that the plaintiff was not entitled to have the second issue entered for him, on the ground that the jury must have found that there were two walls, one belonging to the plaintiff and the other to the defendant, which adjoined each other, because, in the abuttals, he did not so describe the walls. (*Murley* v. *M'Dermott*, T. T. 1838, Q. B., 3 N. & P. 356).

(*k*) Costs.

1. *In general**.

2. *Where several Issues*†.

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3. *Of Witnesses.*

Starling *v.* Cozens, T. T. 1835. Ex. 2 *C., M. & R.* 445.

Defendant is entitled to the costs of witnesses on an issue found for him.

In an action of trespass against four defendants, the declaration contained two counts. One defendant was found guilty on the first count but acquitted on the second, and the other three defendants were acquitted on both counts.

The Court held, that the defendant, who was found guilty on the first count, was entitled to have the costs of such of his witnesses as related to his defence to the second count, to be deducted from the plaintiff's costs; and that the other three defendants were entitled to a fourth share of the costs of the defence, unless it appeared that they had not employed the attorney, and that it must be taken primâ facie that they had retained him.

* As the 3 & 4 Vict. c. 24, and the 4 & 5 Vict. c. 28, inserted ante, vol. 3, p. 213, have altered the law with respect to the statutes relating to costs, it has been thought advisable to refer to those cases only. (See *Wright* v. *Piggin*, M. T. 1828, Ex., 2 Y. & J. 544; *Daubney* v. *Cooper*, E. T. 1830, K. B., 10 B. & C. 830; *Broadbent* v. *Shaw*, M. T. 1831, K. B., 2 B. & Ad. 940; *Starling* v. *Cozens*, E. T. 1835, Ex., 3 D. P. C. 782; *Smith* v. *Edwards*, H. T. 1836, B. C., 4 D. P. C. 621; *Hughes* v. *Hughes*, M. T. 1835, Ex., 2 C., M. & R. 663; S. C. 4 D. P. C. 532; S. C. 1 T. & G. 4; *Bone* v. *Dawe*, T. T. 1835, K. B., 5 N. & M. 230; S. C. 3 Ad. & E. 711; *Griffiths* v. *Jones*, T. T. 1836, Ex., 1 M. & W. 731; S. C. 5 D. P. C. 167; S. C. 1 T. & G. 131; *Berkeley* v. *Demery*, H. T. 1830, K. B., 5 M. & R. 442; *Patrick* v. *Colerick*, M. T. 1838, Ex., 4 M. & W. 527; S. C. 7 D. P. C. 201; *Pursell* v. *Horne*, M. T. 1838, Q. B., 3 N. & P. 554; *Pugh* v. *Roberts*, E. T. 1838, Ex., 6 D. P. C. 561).

Where, in trespass quare clausam fregit, the defendant pleads the general issue, intending to give the special matter in evidence, by virtue of an act of Parliament, if the jury find less than 40*s.* damages, the plaintiff is entitled to costs, unless the defendant, in pleading the general issue, has inserted in the margin of the plea, "by statute," pursuant to the Rule of Trinity Term, 1 Vict. (*Jones* v. *Thomas*, M. T. 1839, B. C., 8 D. P. C. 99).

† Where, in trespass, the defendant pleaded not guilty and a justification; and there was a verdict against him, with nominal damages on the plea of not guilty, and the jury found in his favour on the plea of justification:—Held, that the defendant was not entitled to have the verdict entered for him on the issue raised on the first plea, inasmuch as, though the finding on the plea of justification gave him the general costs of the action, he had no right to those on the issue raised on the other plea, which he knew to be false, and which he compelled the plaintiff to answer. (*Mullins* v. *Scott*, E. T. 1839, C. P., 5 Bing. N. S. 423). Where the defendant, by leaving the plea of lib. tenem. on the record, obliged the plaintiff to take down the record for trial, and on which the issue was found for him, and for the defendant on the rest:—Held, that the Master had properly allowed the plaintiff the general costs of the cause. (*Forester* v. *Dale*, E. T. 1832, B. C., 1 D. P. C. 412). Although the defendant succeeds, if the jury be discharged as to some issues, defendant is not entitled to the costs of them. (*Vallance* v. *Adams*, T. T. 1833, Ex., 1 C. & M. 856; S. C. 2 D. P. C. 118; S. C. 3 Tyrw. 865).

4. *Where several Defendants**.

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5. *In case of New Assignment*†.

BOOTH *v.* IBBOTSON, E. T. 1827. Ex. 1 *Y. & J.* 354.

Where not guilty pleaded, and new assignment to special pleas, and judgment by default on new assignment, the plaintiff is entitled to costs of trial.

IN trespass quare clausum fregit and de bonis asportatis, the defendant pleaded the general issue and other pleas as to part of the trespasses, to which there was a new assignment, and judgment by default thereon.

The Court held, that, the general issue being pleaded to the whole declaration, it was necessary for the plaintiff to go down to trial to get rid of that plea, and prove some of the trespasses, without which no damages and costs could have been obtained on the judgment by default; the plaintiff having obtained a verdict on the general issue and damages on the judgment by default, he was entitled to full costs of trial.

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6. *In case of Discontinuance*‡.

* Where one of three defendants in trespass, who appeared by the same attorney, but severed in pleading, obtained a verdict:—Held, that he was entitled both to his own costs and also an aliquot portion of the costs of the other defendants, upon satisfying the Master that he was not indemnified by them. (*Griffiths* v. *Kynaston*, E. T. 1834, Ex., 3 Tyrw. 757). In an action of trespass against two defendants, they pleaded by different attornies, but appeared by the same counsel, and a verdict was found for one and against the other:—Held, that the defendant who obtained a verdict was only entitled to half the costs of trial, counsel's fees, &c. (*Bartholomew* v. *Stephens*, M. T. 1839, Ex., 7 D. P. C. 808; S. C. 5 M. & W. 386). Where two defendants in trespass severed in pleading, all the pleas going to the whole action, and one succeeded on one issue and the other on all:—Held, that they were entitled to separate costs, each upon the issues found for them; but the attornies being partners in the same firm, and the Master having taxed as if they had appeared by the same attorney, the Court refused to disturb the taxation. (*Gambrell* v. *Earl of Falmouth*, K. B., 5 Ad. & E. 403).

† In trespass, the defendant pleaded, 1st, not guilty; and 2nd, a justification. Issue on the first plea, traverse of the second, and new assignment for excess. Issue joined on the traverse, plea of not guilty withdrawn, &c. Judgment by default on the new assignment, nol. pros. as to the issue on the second plea, and a writ of inquiry executed on the judgment by default:—Held, that the plaintiff was only entitled to the costs of executing a writ of inquiry. (*Ruddock* v. *Smith*, T. T. 1832, B. C., 1 D. P. C. 467). To an action of trespass for breaking down the plaintiff's walls, the defendant pleaded not guilty, and seven special pleas, justifying under a right of way; the plaintiff joined issue on not guilty, traversed the other pleas, and new assigned. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The jury found a verdict for the plaintiff on the plea of not guilty, with 1*s*. damages, and 40*s*. damages were assessed on the new assignment, the party consenting that the question of costs should not be affected thereby; but a verdict was found for the defendant on one of the special pleas:—Held, that the plaintiff having been obliged to go down to trial on the plea of not guilty, he was entitled to the general costs of the cause. (*Vickers* v. *Gullimore*, M. T. 1828, C. P., 5 Bing. 196; S. C. 2 M. & P. 359).

‡ In an action of trespass, the defendant justified under a distress for a fee-farm rent, deducing his title so far back as the reign of Car. 2. After issue joined the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of taking any abstracts relating to his proposed defence or of consultations. (*Rivis* v. *Hatton*, H. T. 1840, B. C., 8 D. P. C. 164).

7. *As to Policemen.*

HUMPHREY *v.* WOODHOUSE, H. T. 1835. C. P. 3 *D. P. C.* 416; S. C. 1 *Bing. N. S.* 506; S. C. 1 *Scott*, 395.

The 3 & 4 Will. 4, c. 42, does not alter the 10 Geo. 4, c. 44.

IN an action of trespass—

The Court said, that a Judge at Nisi Prius has no authority under 8 & 9 Will. 3, c. 11, s. 1, or 3 & 4 Will. 4, c. 42, s. 32, to grant a certificate to deprive defendants, police officers, who have been acquitted, of their right to full costs, given by the Metropolitan Police Act, (10 Geo. 4, c. 44, s. 41), as the act, 3 & 4 Will. 4, c. 42, only extends to the operation of the prior act of 8 & 9 Will. 3, and does not control or repeal intermediate acts.

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8. *Of the Judge's Certificate*.*

DAVIS *v.* COLE, T. T. 1840. Ex. 8 *D. P. C.* 732; S. C. 6 *M. & W.* 624.

Under 43 Eliz. certificate may be granted after the trial, if the misprision of the officer†.

IN trespass, the plaintiff recovered less than 40*s.* damages, and the Judge, at the trial, intimated his intention of certifying, to deprive the plaintiff of costs, under the 43 Eliz. c. 6; but, after four days, the plaintiff obtained the record from the associate, no certificate being indorsed on it, and signed judgment; and the Master, on production of the record, taxed the plaintiff his costs.

* See 3 & 4 Vict. c. 24, and 4 & 5 Vict. c. 28, ante, Vol. 3, p. 213.

† The Court will interfere with the Judge's certificate. (*Cann* v. *Facey*, M. T. 1835, K. B., 5 N. & M. 405). In trespass for breaking and entering, &c., pleas, leave and license, and not guilty of the residue, and 6*d.* damages:—Held, that, neither of the issues necessarily raising any question of title, the Judge might certify under 43 Eliz. c. 6. (*Mills* v. *Stephens*, 3 M. & W. 460). Plea, in trespass for entering plaintiff's house and taking away goods, that they were not the house and goods of the plaintiff, but of the defendant; replication, that the defendant had demised the house and goods to the plaintiff from year to year, and that the defendant entered, &c., during the continuance of the demise, and issue on such demise; and the plaintiff obtained a verdict of 20*s.* damages:—Held, that he was entitled to full costs, notwithstanding the Judge had certified under 43 Eliz. c. 6. (*Thomas* v. *Davies*, K. B., 3 N. & P. 567). To a declaration in trespass for breaking and entering the plaintiff's dwelling-house and seizing his goods, the defendant pleaded, as to the breaking and entering, leave and license; and, as to the residue of the cause of action, not guilty. A verdict was found for the plaintiff, with 6*d.* damages, and the Judge certified:—Held, that the Judge had power to certify, it not appearing that the question of title was in issue. (*Mills* v. *Stevens*, E. T. 1838, Ex., 6 D. P. C. 593). Plea, in trespass for assault and false imprisonment, justifying the giving the plaintiff in charge to a police constable, to prevent a breach of the peace, whereon the plaintiff obtained a verdict, with 1*s.* damages.—Held, that, a battery being admitted on the face of the record, the Judge had no power to certify to deprive the plaintiff of his costs. (*Scruton* v. *Taylor*, M. T. 1839, C. P., 8 D. P. C. 110). In trespass quare clausum fregit, a plea, denying the close to be the plaintiff's, is a denial of possession, if the defendant was a wrong-doer; if otherwise, of the right to the possession. In either case it is a denial of title, as even possession is title against a wrong-doer; and, therefore, where such a plea is pleaded, the Judge cannot certify to deprive the plaintiff of costs under 43 Eliz. c. 6. Although upon some of the issues in trespass quare clausum fregit, the freehold or title may come in question, yet, if one special plea, which excludes all question of title, is found against the defendant, the plaintiff is entitled to full costs. (*Purnell* v. *Young*, H. T. 1838, Ex., 6 D. P. C. 347; S. C. 3 M. & W. 288).

The Court confirmed an order of the Judge for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation.

(*l*) Of the postea*.

(*m*) Amendments†.

(*n*) Nonsuit.

Walford *v.* Anthony, M. T. 1831. C. P. 8 *Bing.* 75; 6 *M. & P.* 126.

The description of the locus in quo, in an action of trespass against several defendants, whose names were set out in the commencement of the declaration, but who were afterwards styled "the said defendants," stated the abuttal to be on the close of "the said defendant."

Declaration against defendants. Close described as abutting on close of defendant:—Held, an ambiguity, not a variance to ground a nonsuit.

The Court held, that this did not necessarily refer to the last-named defendant, and therefore did not amount to a variance, but to an ambiguity, which could only be taken advantage of on special demurrer, and was not a ground of nonsuit.

(*o*) Inquiry, writ of‡.

(*p*) New trial§.

IV. RELATIVE TO THE PETTY TRESPASS ACT‖. See 1 Geo. 4, c. 56, and 7 & 8 Geo. 4, c. 90.

Daniell *v.* Phillips, H. T. 1835. Ex. 1 *C., M. & R.* 662; S. C. 5 *Tyrw.* 293.

A commitment under the 7 & 8

A commitment under 7 & 8 Geo. 4, c. 30, s. 24, stated that the party committed had been charged with having unlawfully tres-

* In trespass quare clausum fregit, the defendant pleaded, first, not guilty; secondly, the plaintiff not possessed; thirdly, right of way; verdict for him on the third issue, but for the plaintiff on the two first, with 1*s.* damages: the defendant, having substantially succeeded in the cause, is entitled to the postea. (*Staley* v. *Long*, E. T. 1837, C. P., 3 Bing. N. S. 781; S. C. 5 D. P. C. 616).

† In trespass for breaking the close called Cloves-Hill, the name proved being Cloves Moor, amendment allowed. (*Howell* v. *Thomas*, 1836, N. P., 7 C. & P. 342). But in trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors, but, by mistake, omitted to justify the taking of the handkerchiefs:—Held, that this omission could not be amended on the trial. (*John* v. *Currie*, 1834, N. P., 6 C. & P. 618).

‡ The Court, on granting a new trial for an assessment of damages on an erroneous principle, will not limit the inquiry to the question of damages. (*Mahony* v. *Frasi*, H. T. 1833, Ex., 1 C. & M. 325; S. C. 1 D. P. C. 703).

§ Where, in trespass for taking the plaintiff's goods, the plea was, leave and license, and it appeared that the plaintiff, an ignorant young person, on his father's bankruptcy, being told by the commissioners at an examination, the defendant not being present, that the goods were his father's, said he would give them up, the Court granted a new trial, on the ground that the evidence did not sustain the plea. (*Roper* v. *Harper*, M. T. 1837, C. P., 4 Bing. N. S. 20; S. C. 3 Scott, 350).

Under 1 Geo. 4, c. 56, s. 9, immediate notice of appeal must be given. (*Rex*

Geo. 4, must use the words "wilful and malicious," and should be for a fixed time, "unless the money should be sooner paid."

passed upon lands, and with having cut down, and carried away therefrom, a quantity of rushes, of which offence he had been convicted, and ordered to pay 10*s.* as a penalty, and so much for costs, &c., and required the gaoler, &c., safely to keep him for the space of one month, or until he should be thence delivered by the due order of law.

The Court held, that the omission of the statement, that the trespass was wilful or malicious, was cured by an allegation in the conviction, that the act was done "unlawfully and maliciously." Secondly, that, although the words "until he be delivered by the due order of law" were not equivalent to the words of qualification in the act, "unless the money should be sooner paid," yet that, under sect. 39, the defect and ambiguity in the conclusion of the warrant might be supplied and explained by reference to the conviction, containing an adjudication of imprisonment in the language of the statute.

Trial.

I. RELATIVE TO CIVIL PROCEEDINGS.

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1. *Notice of Trial.*

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v. *Justices of Huntingdon,* M. T. 1824, K. B., 5 D. & R. 138). Magistrates have jurisdiction in cases of wilful trespasses, although the damage to growing wood does not amount to the value of 6*d.*, notwithstanding sect. 20 of 7 & 8 Geo. 4, c. 90; and the mere statement of a claim of title, without proof, does not prevent the justices from exercising their discretion as to the act being done under a bonâ fide claim or not. (*Reg.* v. *Dodson,* H. T, 1839, Q. B., 9 Ad. & E. 704). In trespass for false imprisonment, for giving the plaintiff into custody under 7 & 8 Geo. 4, c. 30, (Malicious Trespass Act):—Held, that, although mere bona fides would not entitle the defendant to notice of action, yet the facts are such as to furnish a fair ground for supposing that the party is acting under the statute; he is thereby entitled to the protection. (*Cann* v. *Clipperton,* K. B., 2 P. & D. 563). In an action for false imprisonment, the defendant justified under the 1 Geo. 4, c. 56, as the owner of the land on which plaintiff was trespassing; it was held, to make out his justification, he must give positive proof of actual damage being done, so as to enable the jury to decide on the quantum of it, and that the jury were not to presume damage from the mere fact of a trespass being committed. (*Butler* v. *Turley,* H. T. 1827, N. P., 1 M. & M. 54; S. C. 2 C. & P. 585).

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I. RELATIVE TO CIVIL PROCEEDINGS.

(*a*) AT BAR*.

(*b*) AT NISI PRIUS.

1. *Notice of Trial.*

1.—*In what Cases, and when to be given*†.

2.—*What Notice necessary*‡.

* The Court will not grant a trial at bar in a writ of right, although the cause embraces questions as to value and difficulty, unless the specific difficulties be presented to them at the time of the application. (*Angell* v. *Angell*, E. T. 1827, C. P., 3 Bing. 397). By Reg. Gen., H. T. 2 Will. 4, it is ordered that notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party.

† Where a cause is made a remanet at the assizes, a new notice of trial is necessary, but not where made so at the sittings. (*Gains* v. *Bilson*, E. T. 1827, C. P., 4 Bing. 414; S. C. 1 M. & P. 87. By Reg. Gen., H. T. 2 Will. 4, in all cases where the plaintiff in pleading concludes to the country, the plaintiff 's attorney may give notice of trial at the time of delivering his replication or other subsequent pleadings.

Where a second notice of trial is treated as a continuance of one in the same term, it cannot be afterwards treated as an original notice, so as to evade the rule, that not more than one continuance shall be allowed in one term. (*Wyatt* v. *Stocken*, 6 A. & E. 803). So, where a verdict was obtained in the absence of the defendant, on account of no notice of trial being given, the Court set the verdict aside, though the defendant did not swear positively to a good defence on the merits. (*Williams* v. *Williams*, H. T. 1834, Ex., 2 D. P. C. 350).

‡ By Reg. Gen., M. T. 2 Will. 4, it is ordered, that, from and after Michaelmas Term, the sitting day at Nisi Prius, at the Guildhall, in and for the city of London, shall be the second day after every term, and that such sitting shall be adjourned until such day as the Court shall then direct. And it is further ordered, that, in every notice of trial hereafter to be given for the sittings after any term to be holden at the Guildhall aforesaid, it shall be specified whether the

3.—*By whom to be given* *.

4.—*Form of* †.

5.—*Service of* ‡.

6.—*By Continuance* §.

7.—*Of Term's Notice* ‖.

8.—*Of Short Notices.*

DIGNAM *v.* IBBOTSON, E. T. 1838. Ex. 3 *M. & W.* 431.

Term "short notice" applies to the next

A JUDGE'S order for time to plead imposed the term of taking short notice of trial, if necessary, whether tried before the sheriff or not.

cause is intended to be tried on the first day of such sittings, or at the adjournment day, and that, in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant or defendants reside above forty miles from the said city of London, and four days before the said first day, if the defendant or defendants reside within that distance. A notice of trial before the sheriff for Easter Tuesday is good. (*Charnock* v. *Smith*, E. T. 1835, B. C., 3 D. P. C. 607).

* Notice of trial, signed by a party who had not taken out his certificate:—Held, irregular, and set aside. (*Patterson* v. *Powell*, T. T. 1832, C. P., 9 Bing. 620; S. C. 2 M. & Scott, 773).

† A notice of trial at "Guildhall, Westminster," the Court of King's Bench not sitting there, is defective, if the defendant swears that he was misled by it. (*Cross* v. *Long*, E. T. 1832, B. C., 1 D. P. C. 342). Where the issue was delivered with notice of trial indorsed for one day, and a separate notice for another, and the defendant, acting on the notice on the back of the issue, did not attend at the trial on the day mentioned in the separate notice, the Court granted a new trial without costs. (*Kerry* v. *Reynolds*, T. T. 1835, Ex., 2 C., M. & R. 310; S. C. 4 D. P. C. 234).

‡ A request by a defendant, that a notice of trial may be put through his door, is no waiver of a personal service of notice of trial. (*Fry* v. *Mann*, E. T. 1832, B. C., 1 D. P. C. 419). So, service of notice of trial upon the laundress, who has charge of the house in which the defendant's attorney's office is situated, is no good service; but notice of continuance being subsequently given, the defendant's attorney ought to make known his suggestion as to the non-service of the previous notice, by returning it to the plaintiff's attorney; if not, he waives it. (*Brown* v. *Whitfall*, E. T. 1840, C. P., 8 D. P. C. 592; S. C. 1 Scott, N. S. 159).

§ By Reg. Gen., H. T. 2 Will. 4, notice of trial, by continuance, shall be given in town, unless otherwise ordered by the Court or a Judge. The two days' notice of continuance of notice of trial must be two clear days, exclusive of an intervening Sunday. (*Grogan* v. *Manning*, T. T. 1832, Ex., 2 Tyrw. 728).

A continuance of notice of trial on Saturday for Monday:—Held bad, Sunday being no day for that purpose. (*Wardle* v. *Ackland*, E. T. 1833, Ex., 2 D. P. C. 28; S. C. 3 Tyrw. 819). But a continuance of notice of trial on Friday for Monday is sufficient. (*Stewart* v. *Abraham*, T. T. 1834, Ex., 2 D. P. C. 709). There is no distinction between the notice of continuance and notice of countermand of trial, and the same time must expire. (*Forbes* v. *Crow*, E. T. 1836, Ex., 1 M. & W. 465).

Where, in the notice to continue notice of trial, given in Easter Term, by mistake Hilary was inserted for Trinity:—Held, that, as it could not possibly have misled the defendant, he could not treat it as a nullity, and a new trial was refused. (*Morgan* v. *Pearce*, H. T. 1832, C. P., 2 M. & Scott, 159).

‖ By Reg. Gen., H. T. 2 Will. 4, where a term's notice of trial is required, such notice may be given at any time before the first day of term.

The Court held, that the plaintiff, neglecting to try on the next practicable day on which the sheriff sat after issue joined, was bound to give full notice of trial for any subsequent day. practicable day of trying *.

9.—*Of Countermand.*

KING *v.* JONES, M. T. 1832. Ex. 1 *C. & M.* 71; S. C. 1 *D. P. C.* 640.

IN this case, which was a country case, the defendant being under terms to accept seven days' notice of trial, the plaintiff gave four days' countermand only. A rule for costs of the day, for not proceeding to trial pursuant to notice, having been obtained— Agreeing to short notice of trial does not entitle plaintiff to change time of countermand †.

Per Cur.—The countermand in this case was not due in time. The defendant was under no terms to accept a shorter notice of countermand, but stood in the same situation in that respect as if he had been entitled to a ten days' notice of trial.—Rule absolute.

10.—*Not proceeding according to* ‡.

11.—*When Cause taken as undefended* §.

* Where a defendant is under terms to accept short notice of trial for the first sittings in term, and the plaintiff, without any default on the part of the defendant, is unable to reply, so as to give such notice, a short notice of trial for the second sittings is irregular. (*White* v. *Clarke*, T. T. 1840, B. C., 8 D. P. C. 730). By Reg. Gen., H. T. 2 Will. 4, the expression "short notice of trial" shall, in country causes, be taken to mean four days. Short notice of trial in country causes means four days peremptorily before the commission day, although, from the length of the pleadings, the issue is not joined soon enough to admit of so many days. (*Lawson* v. *Robinson*, E. T. 1833, Ex., 1 C. & M. 499; S. C. 2 D. P. C. 69).

Upon time given to plead upon the terms, inter alia, of taking short notice of trial, if necessary, and the pleas were delivered on the 19th February, the replication on the 27th, indorsed with notice of trial at the assizes on the 3rd March, although the delay was accounted for, the notice having been treated as a nullity and the cause having been undefended, the Court granted a new trial. (*Pounds* v. *Penfold*, T. T. 1835, K. B., 5 N. & M. 186).

Where a defendant is under terms to take short notice of trial, he is not bound to take short notice of executing a writ of inquiry. (*Stevens* v. *Pell*, H. T. 1834, Ex., 2 C. & M. 421; S. C. 2 D. P. C. 355; S. C. 4 Tyrw. 6).

† By Reg. Gen., H. T. 2 Will. 4, countermand of notice of trial may be given either in town or country, unless otherwise ordered by the Court or a Judge. A notice of countermand, signed "B. B., plaintiff's attorney," is sufficient, though the name of another attorney is on the record, if the defendant is not misled by it, and the individual signing it is really the attorney. (*Cheslyn* v. *Pearce*, H. T. 1836, Ex., 1 M. & W. 56; S. C. 4 D. P. C. 693; S. C. 1 Tyrw. & G. 238). A notice of countermand given to a defendant residing in the country, whose cause is conducted by an attorney in London only, is insufficient. (*Margettson* v. *Rush*, E. T. 1840, Ex., 8 D. P. C. 388).

‡ On motion for costs of the day, for not proceeding to trial on two different occasions pursuant to notice, the Court will not make the payment of those costs a condition precedent to the plaintiff's trying his cause. (*Shoredicke* v. *Gilbard*, H. T. 1840, B. C., 8 D. P. C. 296).

§ Where the cause had been taken out of its turn, in the absence of the defendant's counsel, being alleged by the plaintiff to be undefended, the Court allowed it to be set down for trial, the costs to abide the event of the cause.

2. *Notice to produce.* See, also, tits. *Evidence—Witness.*

BATE *v.* KINSEY, T. T. 1834. Ex. 1 *C., M. & R.* 38.

An attorney called as a wit ness is not bound to produce a deed, though in Court, without notice to produce*.

IN an action of debt for rent in arrear, by the assignee of the reversioner against the assignee of the term, the plaintiff's attorney proved the execution of a conveyance of the premises to the plaintiff; but he admitted, on cross-examination, that a subsequent deed had been executed between the same parties relating to the same premises. This deed, he stated, was in Court; but he refused to produce it, on the ground, that he was not compellable to produce his client's title-deeds. The defendant's counsel then submitted, that he had a right to give parol evidence of the second deed, without stating that he was prepared with any, and what was the nature of the parol evidence.

The Court held, that, as no notice to produce the deed had been given, the parol evidence was properly rejected.

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3. *Entering Causes, taking Causes out of Order, and of the Cause List* †.

(*Dorrien* v. *Howell*, H. T. 1840, C. P., 6 Bing. N. S. 245; S. C. 8 D. P. C. 277). And where a plaintiff gave notice that he should take the cause down to trial as an undefended cause, and when it was called on, the defendant's counsel said it was defended, whereupon it was not tried, but the plaintiff again took the record down and got the cause tried as undefended, without any new notice or setting it down in the paper, the Court granted a new trial without payment of costs. (*Sprigge* v. *Rutherford*, M. T. 1833, B. C., 2 D. P. C. 429).

* Notice to produce must be served before the commission day on parties living away from the assize town. (*Trist* v. *Johnson*, 1833, N. P., 1 M. & Rob. 259). The same rule applies to criminal cases. (*Rex* v. *Ellicombe*, Id.) A notice to produce, served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late. Notices to produce ought to be served on the attorney, if there be one. (*Houseman* v. *Roberts*, T. T. 1832, N. P., 5 C. & P. 394). A cause came on to be tried at the assizes on a Wednesday morning. On the previous evening, the defendant's attorney, being at the assize town, was served with a notice to produce a book which would probably be at his office, which was nineteen miles from the assize town:—Held, that this notice was too late. (*Hargest* v. *Fothergill*, 1832, N. P., 5 C. & P. 303). Notice to produce served upon the original attorney in the cause—Held, sufficient, although the attorney was changed on the eve of the trial. (*Doe* d. *Martin* v. *Martin*, M. T. 1832, N. P., 1 M. & Rob. 242).

† Entry of the cause by the defendant, with a ne recipiatur—Held, to be no authority to the plaintiff to try it when called on; and that, not having entered his record at all, he could not retain the verdict. (*Watson* v. *Gowar*, T. T. 1827, K. K., 8 D. & R. 456).

Where a defendant died in the course of the sittings in term, the Court refused to allow the cause to be tried on the last day of the term, to which the sittings had been adjourned for that purpose; nor would they interfere, by appointing for the trial another day out of term, and entering the verdict as of the sittings in the term. (*Johnson* v. *Budge*, M. T. 1834, Ex., 1 C., M. & R. 647; S. C. 3 D. P. C. 207; S. C. 5 Tyrw. 197). Application was made on the part of the plaintiff to have a cause taken out of its turn, in order that it might be tried during the existing sittings, on the ground that the defendant had died since the commencement of such sittings. The application was opposed on the part of the defendant's executors, and refused by the Chief Justice of the Common Pleas, after time taken to consider. (*Iszard* v. *Milner*, H. T. 1830, N. P., 4 C. & P. 285).

The Court in banc has no jurisdiction over the cause list at Nisi Prius. (*Jacob* v. *Rule*, E. T. 1832, B. C., 1 D. P. C. 349).

Whilst a cause stood in the paper for trial, the plaintiff having obtained

4. *Course of proceeding at the Trial*.*

order to amend, (which was, in fact, unnecessary), the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained; whilst the second order was in discussion at Chambers the cause was tried, and the plaintiff obtained a verdict: the Court refused to grant a new trial without an affidavit on the merits. (*Clark* v. *Manns*, H. T. 1833, Ex., 1 D. P. C. 656).

The clerks of a plaintiff's attorney, on entering and bringing in the record on the 21st of November, were told (as they understood) that the adjournment day in London would be December 8th; it was, in fact, December 6th, but it was not fixed till after the end of Michaelmas Term. The plaintiff was nonsuited on December 7th, no one appearing for him; and the Lord Chief Justice would not order the cause to be restored, as the parties should not have been satisfied with information obtained at so early a period. (*Hall* v. *Milligan*, M. T. 1837, N. P., 8 C. & P. 314).

* If a letter be shewn to a witness for the defendant on the voir dire, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on this letter in his reply. (*Paul* v. *White*, E. T. 1832, N. P., 5 C. & P. 237).

Where a party addresses the jury himself, he must also examine his witnesses, and counsel can only be heard to assist him on legal points. (*Shuttleworth* v. *Nicholson*, 1833, N. P., 1 M. & Rob. 254).

Right to begin.]—Trover by the assignees of a bankrupt against the sheriff for goods. Plea, that R. J. sued out a writ of fi. fa. against the plaintiff, and that it was delivered to the sheriff before the bankruptcy, and that the sheriff seized and sold the goods, and that no docket had been struck against the bankrupt, neither had the sheriff notice of any act of bankruptcy. Replication, that the judgment was obtained against the bankrupt by cognovit in an action commenced by collusion, and that the fiat issued within two months after the seizure. Rejoinder, that the action was commenced adversely:—Held, that, on these pleadings, the plaintiff must begin. (*Scott* v. *Lewis*, 1836, N. P., 7 C. & P. 347). So, in an action for a libel, when there is no general issue, but a justification is pleaded as to part, and judgment is suffered by default as to the residue, the plaintiff is entitled to begin. (*Wood* v. *Pringle*, H. T. 1833, N. P., 1 M. & Rob. 277). Although the defendant may be under a rule to admit the plaintiff's case, the plaintiff has still the right to begin. (*Thwaites* v. *Sainsbury*, T. T. 1831, N. P., 5 C. & P. 69).

The right to begin is not so entirely for the disposal of the Judge at Nisi Prius, but that, if his decision were clearly wrong, the Court would interfere. (*Huckman* v. *Fernie*, E. T. 1838, Ex., 3 M. & W. 505).

Right to reply.]—Where a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply. (*Arden* v. *Tucker*, T. T. 1832, N. P., 1 M. & Rob. 192). If, after a witness for the defendant has been examined as to a conversation which he put down in writing, and has not been asked to produce the memorandum, and the plaintiff's counsel, in reply, has observed upon its absence, the Judge, for his own satisfaction, asks the witness for the paper, and it is produced, such production will not entitle the plaintiff's counsel to address the jury again on it. (*Dowling* v. *Finnigan*, M. T. 1824, N. P., 1 C. & P. 587). The cross-examination is to be held notice of the intended defence; the plaintiff is therefore bound to go into evidence to rebut it before he closes his case, and cannot enter into it in evidence in reply. (*Wharton* v. *Lewis*, M. T. 1824, N. P., 1 C. & P. 529).

If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observes upon the general state of the book, and refers to other parts of it, such observations do not give the plaintiff's counsel the right of reply. (*Pullen* v. *White*, E. T. 1828, N. P., 3 C. & P. 434).

Where several Defendants.]—Only one counsel can be allowed to address the jury for several defendants relying on the same defence. (*Mason* v. *Ditchbourne*, 1835, N. P., 1 M. & Rob. 462). Where two defendants appear by different attornies and counsel, and have pleaded separately the general issue, and several special pleas verbatim the same, the issues on each set of pleas being exactly the same, the judge at the trial will only allow one counsel to address the jury for the defendants. (*Sparkes* v. *Barrett*, M. T. 1837, N. P., 8 C. & P. 442). So, where the defendants had pleaded a joint plea of not guilty, the judge will not allow

5. *Ordering Witnesses out of Court.* See tit. *Witness.*

6. *Withdrawing the Record, and striking the Cause out* *. See, also, tit. *Record.*

(*c*) By proviso †.

(*d*) By record. See tit. *Record.*

(*e*) Putting off trials ‡.

(*f*) New trials. See tit. *New Trial,* and particular heads according to the subject-matter.

II. RELATIVE TO CRIMINAL PROCEEDINGS§. See, also, tit. *Indictment.*

the counsel of each defendant either to cross-examine separately, or to address the jury separately. (*Seale* v. *Evans*, M. T. 1836, N. P., 7 C. & P. 593).

* The Judge, in an undefended cause, where the plaintiff could not get on for want of a written agreement, discharged the jury, and allowed the record to be withdrawn, in order to save expense to the parties. (*Bonsor* v. *Element*, M. T. 1833, N. P., 6 C. & P. 230). Where the plea had been omitted, and no issue, an amendment was refused, and the cause struck out. (*Whitehead* v. *Scott*, 1831, N. P., 2 M. & M. 136).

† By Reg. Gen., H. T. 2 Will. 4, no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

‡ Intelligence having been received of the death of the plaintiff abroad, the Court, upon application of the defendant, granted a rule for postponing the trial until the Court or a Judge should direct it to be had, the plaintiff's attorney admitting that some doubts existed as to whether his client was still alive or not. (*Chesser* v. *Ridgway*, M. T. 1840, C. P., 9 D. P. C. 67). But the Court refused to put off the trial, on the ground that a bankrupt, the principal witness, had had his certificate signed by a sufficient number of creditors, and that no opposition was expected to its allowance by the Lord Chancellor. (*Tennant* v. *Strachan*, T. T. 1829, N. P., 1 M. & M. 377; S. C. 4 C. & P. 31). So, the Court refused to put off a trial at the instance of the plaintiff, on account of the absence of a material witness, although it was suggested that the demand was so very small, and the plaintiff poor. (*Fendall* v. *Marriott*, 1830, N. P., 2 M. & M. 1). So, where the cause was on the list for Monday, and notice of a rule for a special jury had been obtained on Saturday, but not served until seven o'clock, the Judge refused to allow the cause to stand over until the special juries taken. (*Johnson* v. *Blackwell*, M. T. 1833, N. P., 6 C. & P. 236).

Where a defendant applies to put off a trial, on account of the absence of a material witness, but does not give notice to the other side till expense has been incurred in bringing up witnesses, the application will only be granted on payment of the expense of the witnesses. It is not necessary that the affidavit in support of such an application should swear to a good defence on the merits; it is sufficient, if the witness is sworn to be material and necessary. (*Attorney-General* v. *Hull*, T. T. 1833, Ex., 2 D. P. C. 111). And the defendant need not give the name of the absent witnesses. (*Buckingham* v. *Banks*, T. T. 1824, K. B., 4 D. & R. 830, n.)

§ Where a party arraigned persisted in saying that he would be tried "by his king and his country:"—Held, not to invalidate a conviction. (*Rex* v. *Davis*, 1820, N. P., 1 Gow, 219).

In opening a case of felony, the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession; but he may state the general effect of what the prisoner said. (*Rex* v. *Swatkins*, 1831, N. P., 4 C. & P. 548). Where a party

Trial, Writ of*.

I. RELATIVE TO THE POWER OF THE SHERIFF, AND THE JUDGE MAKING THE ORDER TO TRY BEFORE THE SHERIFF, p. 526.

II. RELATIVE TO WHAT CASES MAY OR MAY NOT BE TRIED UNDER 3 & 4 Will. 4, c. 42, p. 526.

III. RELATIVE TO THE FORM OF THE WRIT OF TRIAL, AND OF THE ISSUE, p. 527.

IV. RELATIVE TO THE NOTICE OF TRIAL, AND PROCEEDINGS AT THE TRIAL, p. 528.

V. RELATIVE TO THE SHERIFF'S NOTES, p. 528.

VI. RELATIVE TO THE VERDICT, JUDGMENT, AND EXECUTION, p. 529.

VII. RELATIVE TO COSTS, p. 529.

VIII. RELATIVE TO AMENDMENTS, p. 529.

IX. RELATIVE TO BILL OF EXCEPTIONS, p. 529.

was incapacitated from giving evidence by a conviction of bigamy, the Judge allowed a trial for murder to be postponed, in order that, in case of a pardon obtained, the witness might be examined. (*Reg.* v. *Owen*, 1839, N. P., 9 C. & P. 83). Where the Court postpones the trial at the instance of the prisoner, it never requires him to pay the costs of the prosecution, nor will it make any order for payment of them until after trial. (*Rex* v. *Hunter*, 1829, N. P., 3 C. & P. 591).

* By 3 & 4 Will. 4, c. 42, s. 17, it is enacted, "That in any action depending in any of the supreme Courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the Court in which such suit shall be depending, or any Judge of any of the said Courts, if such Judge or Court shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any Judge of any Court of record, for the recovery of debt in such county, and for that purpose a writ shall issue, directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain in term, or in vacation, to be named in such writ; and thereupon such sheriff or Judge shall summon a jury, and shall proceed to such issue or issues." By sect. 18, it is enacted, "That, at the return of any such writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury, on the trial of such issue or issues, shall be as valid and of the like force as a verdict of a jury at Nisi Prius; and the sheriff, or his deputy, or Judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are given to Judges at Nisi Prius."

X. RELATIVE TO NONSUIT, p. 529.

XI. RELATIVE TO SETTING ASIDE JUDGMENT ON, AND OF NEW TRIALS, p. 530.

I. RELATIVE TO THE POWER OF THE SHERIFF AND THE JUDGE MAKING THE ORDER TO TRY BEFORE THE SHERIFF.

CLARK *v.* WARNER, H. T. 1834. C. P. 4 *M. & Scott*, 171.

Trial before a deputy no objection if sheriff has power to appoint one *.

THE writ of trial, issued under the 17th section of the 3 & 4 Will. 4, c. 42, directed to the mayor of a certain town—

The Court held, that the trial under such writ was valid, though the writ be directed to that officer, and not to the sheriff, and though the trial take place before the deputy, not the mayor himself, and though the deputy return the writ; no substantial defect appearing on the face of the record itself, and the sheriff having power to appoint the deputy.

WRIGHT *v.* SKINNER, H. T. 1836. Ex. 4 *D. P. C.* 727; S. C. 2 *C., M. & R.* 746; S. C. 1 *Tyrw. & G.* 69.

In making order Judge cannot impose terms as to time of trial†.

THE defendant took out a summons before a Judge for a trial before the sheriff, and the Judge made an order (without consent) to try before the sheriff in a fortnight, unless the parties consented to a stet processus. The plaintiff then took out another summons to rescind that order.

Parke, B.—I certainly do not see how a Judge can impose terms on the plaintiff where the defendant asks for permission to try before the sheriff. The order, therefore, was inoperative.

II. RELATIVE TO WHAT CASES MAY OR MAY NOT BE TRIED UNDER 3 & 4 WILL. 4. C. 42.

ALLEN *v.* PINK, T. T. 1838. Ex. 4 *M. & W.* 140; S. C. 6 *D. P. C.* 668.

Where the action is in sub-

IN assumpsit, the declaration stated that, in consideration that the plaintiff would buy of the defendant a certain horse for *7l.* 2*s.* 6*d.*,

* Where, on the trial of a cause before the sheriff, under the Writ of Trial Act, a verdict was, by consent, taken for the plaintiff, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the Court set aside the verdict and judgment, though not the award, on the ground that the sheriff was bound to try the cause, and could not delegate his authority to another. (*Wilson* v. *Thorpe*, T. T. 1840, Ex., 6 M. & W. 721). It is not necessary, in order to give a county court jurisdiction, that the plaintiff should reside within the county. (*Prichard* v. *M'Gill*, T. T. 1837, Ex., 5 D. P. C. 731; S. C. 2 M. & W. 380; S. P. *Jones* v. *Bond*, H. T. 1837, Ex., 5 D. P. C. 455).

† The Court will not interfere with the discretion of a Judge at chambers as to granting or refusing a writ of trial. (*Davies* v. *Lloyd*, M. T. 1835, Ex., 4 D. P. C. 478; S. C. 1 Tyrw. & G. 28).

the defendant promised the plaintiff that it was a quiet worker, and would go well in spare harness. It then averred the purchase of the horse, and that it was not a quiet worker, and would not go well in spare harness, whereby the plaintiff was put to charges in keeping and taking care of it. There were also counts for money had and received, and money due on an account stated.

stance for money, the form of action is not material*.

The Court held, that this record might be sent for trial before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17, as the substance of the cause of action, and not the form of action, was the test.

III. RELATIVE TO THE FORM OF THE WRIT OF TRIAL, AND OF THE ISSUE.

WHITE *v.* FARRAR, H. T. 1837. Ex. 2 *M. & W.* 288; S. C. 5 *D. P. C.* 463.

THE date of the issuing of the writ of summons was untruly stated in a writ of trial.

The writ of trial must state correctly the writ of summons†.

The Court set aside a verdict which had been recovered thereon, in a case where the defendant had not appeared at the trial.

* A claim against a party for representing that a third person had authorized him to purchase a horse from the plaintiff, who thereupon sent it to the agent, but he had no authority to purchase it, is, in substance, a claim for the price of a horse, and the trial may be sent to the under-sheriff under the 3 & 4 Will. 4, c. 42, s. 17. (*Price* v. *Morgan*, M. T. 1836, Ex., 2 M. & W. 53). But, an action of tort, (*Smith* v. *Brown*, T. T. 1837, Ex., 2 M. & W. 851), or an action for unliquidated damages, cannot be tried even by consent. (*Lawrence* v. *Wilcock*, T. T. 1840, Q. B., 8 D. P. C. 681; S. C. 3 P. & D. 526). As the whole of the cause of action must be for a money demand, (*Jacquet* v. *Bower*, E. T. 1839, Ex., 7 D. P. C. 331; S. C. 5 M. & W. 155), so, if the sum indorsed on the writ of summons exceeds 20*l.*, the cause cannot be tried before the sheriff, but the Court, on motion, at the instance of the plaintiff, will amend the indorsement by substituting a less sum, being the amount due upon the balance, so as to obtain a writ of trial. (*Frodsham* v. *Round*, H. T. 1836, B. C., 4 D. P. C. 569). But where an action had been tried before the sheriff against carriers for negligence—Held, that, having no power to try such a cause, the Court would not order the postea to be delivered to the defendant, but set aside the judgment. (*Smith* v. *Brown*, T. T. 1837, Ex., 5 D. P. C. 736).

† Where the writ of trial mis-recited the date of the writ of summons, but the objection was not insisted on at the trial, which proceeded, and the plaintiff obtained a verdict, the Court would not set aside the writ of trial for such defect, but ordered the rule to be suspended until the plaintiff obtained leave to amend the writ of trial, he paying the costs of the application to the Court. (*Percival* v. *Connell*, T. T. 1837, C. P., 3 Bing. N. S. 877).

Where a cause is directed to be tried before the sheriff, the issue must be framed according to the form given by Rule, H. T. 4 Will. 4, c. 24; and if the issue has been made up and delivered before the order for trial, an order should be obtained for its amendment. (*Ward* v. *Peel*, T. T. 1836, Ex., 1 Tyrw. & G. 1135; S. C. 5 D. P. C. 169; S. C. 1 M. & W. 743).

"No. 1, Clifford's Inn Passage, Fleet-street, London," held a good description of the residence of the party by whom a writ of trial is issued, within the 2 Will. 4, c. 39, s. 12, without naming any parish. (*Arden* v. *Jones*, T. T. 1835, C. P., 4 D. P. C. 120; 2 Scott, 188). Where issues were joined on several pleas in debt, and demurrers to others, and the writ of trial omitted the award of venire to assess damages on the latter, but the plaintiff gave notice that he did not intend to assess any damages thereon:—Held, that the omission was immaterial. (*Hiam* v. *Smith*, T. T. 1838, Ex., 6 D. P. C. 710).

It is no objection to a verdict that no similiter has been added, if there is an

IV. RELATIVE TO THE NOTICE OF TRIAL, AND PROCEEDINGS AT THE TRIAL.

PACKHAM *v.* NEWMAN, M. T. 1834. Ex. 1 *C., M. & R.* 584; S. C. 3 *D. P. C.* 165; S. C. 5 *Tyrw.* 215.

The sheriff has no power to put off the trial *.

UPON a writ of trial, the jury having been sworn, the plaintiff's attorney applied to have the trial postponed, on account of the absence of a material witness. The sheriff refused, thinking that he had no power, and the plaintiff had a verdict. On motion for a new trial on that ground—

Per Cur.—The proper course is to apply to a Judge to put off the trial; the sheriff has no such power.

V. RELATIVE TO THE SHERIFF'S NOTES †. See, also, tit. *New Trial.*

&c. at the end of the replication. It is a ground for arresting judgment on a verdict on a writ of trial, if that part of the form given by the Rules of H. T. 4 Will. 4, which gives jurisdiction to inferior courts to try issues from the superior ones, is omitted. (*Hanaford* v. *Hanaford*, E. T. 1838, B. C., 6 D. P. C. 473).

* The writ of trial is conclusive as to the date of the writ of summons, and cannot be impugned at the trial. (*Whipple* v. *Manley*, E. T. 1836, Ex., 1 M. & W. 432).

Where an under-sheriff had laid down a rule that he would not hear any person as an advocate who was not a barrister or an attorney, and refused accordingly to hear a person who was neither one nor the other, but appeared on the behalf of the defendant, and the plaintiff recovered a verdict, the Court held, that the under-sheriff was quite justified in making such rule; but granted a new trial, on payment of costs, it appearing that the defendant had not had a previous notice of the existence of the rule. (*Tribe* v. *Wingfield*, M. T. 1836, Ex., 2 M. & W. 128).

Under stat. 3 & 4 Will. 4, c. 42, s. 17, a writ of trial was directed to the sheriff's court of the city of London. The writ was returnable on the 19th of January, 1838. On the 18th, a court was holden, and adjourned to the 20th, on which day the trial of the cause was commenced and concluded. The record stated that the trial was had upon the 18th. Quære, whether this was not a mis-trial, and whether application should not have been made to a Judge to have the time extended. (*Mortimer* v. *Preedy*, E. T. 1838, Ex., 3 M. & W. 602).

† On moving for a new trial under the 3 & 4 Will. 4, c. 42, s. 17, (the Writ of Trial Act), the proper course is to have the notes of the presiding officer verified by affidavit, without affidavits of the facts. (*Grainge* v. *Shoppee*, E. T. 1834, Ex., 2 D. P. C. 644; S. C., 4 Tyrw. 1000). If an under-sheriff refuses to transmit his notes taken on the trial of an issue, the Court will compel him to pay the costs consequent on his refusal. (*Metcalf* v. *Parry*, T. T. 1834, B. C., 2 D. P. C. 589). If the sheriff refuses his notes, the facts may be proved by affidavit. (*Thomas* v. *Edwards*, T. T. 1834, Ex., 1 C. M. & R. 382; S. C. 4 Tyrw. 833). The affidavit verifying the notes of the under-sheriff, on a motion for a new trial, must be intitled in the cause. (*Cohen* v. *Williams*, E. T. 1840, B. C., 8 D. P. C. 418). But the affidavit verifying the sheriff's notes need only state that the paper annexed contained the notes transmitted by the under-sheriff to the Court. (*Hellings* v. *Stevens*, T. T. 1834, Ex., 4 Tyrw. 1001).

VI. RELATIVE TO THE VERDICT*, JUDGMENT, AND EXECUTION†.

NICHOLLS *v.* CHAMBERS, T. T. 1834. Ex. 1 *C., M. & R.* 385; S. C. 4 *Tyrw.* 834.

UPON a cause tried before the sheriff—

The Court held, that the plaintiff obtaining a verdict on the 22nd, having taxed his costs and signed judgment on the 27th, was regular; the latter part of the clause of 3 & 4 Will. 4, c. 42, s. 18, enabling a plaintiff to tax his costs, and sign judgment, and issue execution forthwith, not being affected by the concluding clause of that section.

Judgment may be signed after the four days.

VII. RELATIVE TO THE COSTS. See, also, 3 & 4 Will. 4, c. 42, s. 18, ante, p. 525.

JONES *v.* BARNES, H. T. 1837. Ex. 2 *M. & W.* 313.—S. P. WARDROPER *v.* RICHARDSON, 1 *Ad. & E.* 75.

Per Cur.—WHERE the verdict on a writ of trial before the sheriff, or a judge of an inferior court, is under 40*s.*, he has no power to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of his costs; if the action is brought to recover less than that sum, that should be shewn for cause, on application to have the cause so tried.

The sheriff has no power to certify under the stat. of Eliz. to deprive a plaintiff of costs‡.

VIII. RELATIVE TO AMENDMENTS§.

IX. RELATIVE TO BILL OF EXCEPTIONS‖.

X. RELATIVE TO NONSUIT¶.

* Where an action is tried before the sheriff, under the Writ of Trial Act, and the jury gave 20*l.* for the debt, and 10*s.* for interest, semble, that the verdict is bad quoad the 10*s.* (*Burleigh* v. *Kingdom*, H. T. 1834, Ex., 2 D. P. C. 351).

† As to the judgment and execution, see 3 & 4 Will. 4, c. 42, s. 18, ante, p. 525.

‡ Where a cause (in assumpsit) has been partly heard before a Judge in one of the inferior courts, and a verdict has been taken for the plaintiff, subject to a reference, and the arbitrator has awarded damages less than 20*l.*, the Judge has power to certify upon the postea, that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, for the purpose of having the plaintiff's costs taxed on the higher, not the reduced, scale. (*Broggref* v. *Hawke*, T. T. 1837, C. P., 3 Bing. N. S. 881).

§ Where there has been a mistake, the Court will allow the writ of trial to be amended. (*Whipple* v. *Manley*, E. T. 1836, Ex., 1 M. & W. 432). Where the cause had been made a remanet, and the writ was returnable on the day before the trial, the Court would allow, if necessary, the writ to be amended by altering the return. (*Sherman* v. *Tinsley*, E. T. 1836, C. P., 4 Scott, 286).

‖ Where, on the trial of a cause, the under-sheriff declined to sign a bill of exceptions, the Court refused to stay judgment and execution. (*White* v. *Hislop*, T. T. 1838, Ex., 4 M. & W. 73; S. C. 6 D. P. C. 693).

¶ On a writ of trial, under 3 & 4 Will. 4, c. 42, s. 17, the sheriff has the same power, as to directing a nonsuit, as a Judge at Nisi Prius in an ordinary case. (*Watson* v. *Abbot*, M. T. 1833, Ex., 2 D. P. C. 215; S. C. 2 C. & M. 150; S. C. 4 Tyrw. 64). Where the under-sheriff had not stated in his notes that he had given leave to move to enter a nonsuit, the Court refused a motion for that purpose. (*Beverley* v. *Water*, E. T. 1840, B. C., 8 D. P. C. 418).

XI. RELATIVE TO SETTING ASIDE JUDGMENT ON, AND OF NEW TRIALS *. See, also, tit. *New Trial.*

Trover, Action of.

I. RELATIVE TO WHEN IT DOES OR DOES NOT LIE, p. 531.

II. RELATIVE TO THE REQUISITES TO MAINTAIN.

(*a*) Of the plaintiff's title and interest in the thing converted, p. 532.

(*b*) Of the conversion, demand and refusal, p. 533.

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* The stat. 3 & 4 Will. 4, c. 42, s. 19, re-enacts, that all the provisions of the stat. 1 Will. 4, c. 7, shall, "as far as the same are applicable thereto," be extended to judgments and executions upon writs of inquiry and writs of trial:—Held, therefore, that the Court might set aside a judgment and execution on a writ of trial in the same manner as in writs of inquiry under the 4th section of 1 Will. 4, c. 7, even though no application for that purpose, or an unsuccessful one, might have been made to the sheriff who tried the cause, or to a Judge. (*Angell* v. *Iler*, M. T. 1839, Ex., 7 D. P. C. 846; S. C. 5 M. & W. 600). The fact of the person acting as deputy for the sheriff being the attorney for the defendant is not a ground for obtaining a new trial. (*Briggs* v. *Sowton*, M. T. 1840, B. C., 9 D. P. C. 105). So, where, on a trial before the sheriff, a verdict is found for the defendant, and the sum claimed by the plaintiff is less than 5*l.*, the Court will not interfere to disturb it on the ground of its being against evidence. (*Lyddon* v. *Coombes*, E. T. 1837, B. C., 5 D. P. C. 560; S. P. *Williams* v. *Evans*, H. T. 1837, Ex., 2 M. & W. 220). So, where, on a trial before the sheriff, a verdict is found for less than 5*l.* in favour of the plaintiff, the Court will not disturb it on the ground of its being against evidence. (*Fleetwood* v. *Taylor*, T. T. 1838, B. C., 6 D. P. C. 796).

A motion for a new trial in a cause heard before the sheriff under the Writ of Trial Act must be made within the four days, and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of facts; (*Muppin* v. *Gillatt*, T. T. 1835, Ex., 4 D. P. C. 190); and it is no excuse for not making the motion within that time, that the cause was tried in a distant county; a special application should be made for an extension of the time. (*Wheeler* v. *Whitmore*, T. T. 1835, Ex., 4 D. P. C. 235). But the Court will allow further time to make a motion for a new trial if the under-sheriff does not furnish his notes of the trial in proper time. (*Thomas* v. *Edwards*, T. T. 1834, Ex., 2 D. P. C. 664). On an application for a new trial, in a cause tried before the sheriff, the affidavits need not state the pleadings, for the writ of trial is presumed to be in Court. (*Milligan* v. *Thomas*, M. T. 1835, Ex., 4 D. P. C. 373; S. C. 2 C., M. & R. 756; S. C. 1 Tyrw. & G. 134).

On shewing cause against a motion for a new trial, in a case tried before the sheriff, affidavits are admissible stating facts proved at the trial, but which do not appear upon the sheriff's notes. (*Lilley* v. *Johnson*, E. T. 1837, Ex., 2 M. & W. 386; S. C. 5 D. P. C. 606).

Where it is desirable that a cause which has been tried on a writ of trial should be tried before a Judge of the superior Courts, an application for that purpose will be entertained by the Court on disposing of the rule for a new trial, without making a separate application. (*Duddey* v. *Yates*, E. T. 1840, B. C., 8 D. P. C. 487).

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V. RELATIVE TO THE PLEADINGS.

(*a*) Declaration, p. 537.

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I. RELATIVE TO WHEN IT DOES OR DOES NOT LIE*.

Peer *v.* Humphrey, H. T. 1835. K. B. 4 *N. & M.* 430; S. C. 2 *Ad. & E.* 495.

A felon sold the goods stolen (cattle) to the defendant, but not in market overt, who, after notice of the felony and demand, again sold them, and the plaintiff afterwards prosecuted the felon to conviction.

To make the sale of stolen goods legal, it must be in market overt.

* Where any right to sue out execution exists at all, trover cannot be supported for taking too much. (*Wooley* v. *Jennings*, M. T. 1825, N. P., 2 C. & P. 144). A. contracted to sell B. twenty sacks of flour, and gave him an order on C., his wharfinger, requesting him "to deliver to B. twenty sacks of households." On the order being presented to C., he stated that he had only five sacks to spare, but that B. might have them; and they were delivered accordingly. The order was filed by C. in the way that orders accepted by C. generally were,—partial acceptance only. Application was made the following day for the remaining fifteen sacks of flour, when C. replied that B. should have it as soon as he got any. A demand being afterwards made, C. refused to deliver any more, saying that he had no flour of A.'s in his possession. On trover brought by B. against C. to recover the value of the fifteen sacks of flour, the jury found that C. had accepted the order generally, and gave a verdict for the plaintiff:—Held, that the verdict was right, and that trover was maintainable. (*Gillett* v. *Hill*, H. T. 1834, Ex., 2 C. & M. 530; S. C. 4 Tyrw. 290).

Trover lies for a lost bank-note, taken without due caution; (*Easley* v. *Harrison*, M. T. 1833, C. P., 10 Bing. 243; S. C. 3 M. & Scott, 700); and lies by the owner of a note who loses it in a navigable river, though he does not advertise it. (*Backhouse* v. *Harrison*, H. T. 1834, K. B., 3 N. & M. 188). But trover will not lie for a lost bill where the plaintiff himself has by his negligence facilitated its negociation. (*Beckwith* v. *Corral*, E. T. 1826, C. P., 3 Bing. 444). If a party has a good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without he has done everything in his power to bring the thief to justice. (*Gimson* v. *Woodfull*, E. T. 1825, N. P., 2 C. & P. 41).

The Court held, that, by such private sale, the property never having been divested out of the rightful owner, the defendant was liable in trover: distinguishing the case of *Harwood* v. *Smith*, (2 T. R. 750), where the goods had been sold in market overt to the defendant, and he had parted with them before the owner had, by a conviction of the thief, acquired a new right under the statute.

II. RELATIVE TO THE REQUISITES TO MAINTAIN.

(*a*) Of the plaintiff's title and interest in the thing converted.

Gosling *v.* Birnie, H. T. 1831. C. P. 7 *Bing.* 339; S. C. 5 *M. & P.* 160.

A party who has acknowledged plaintiff's title cannot set up a third party's, on being sued in trover*.

The defendant, a wharfinger, having admitted, by parol, that he held certain goods for the plaintiff, in trover for the value—

The Court held, that the defendant was estopped by such admission from shewing that the right of property was in another person.

See 2 *B. & C.* 541; 2 *Campb.* 344.

* Where defendant has only an equitable claim, it is no answer to a demand by the legal owner. (*Selleck* v. *Smith*, T. T. 1826, C. P., 3 Bing. 603).

Acts of ownership sufficient title unless defendant shews a better title. (*Taylor* v. *Parry*, T. T. 1840, C. P., 1 Scott, N. S. 576; 1 M. & G. 604). There must be a transfer of the property or a lien to support trover. (*Bruce* v. *Wait*, M. T. 1837, Ex., 3 M. & W. 15). And trover cannot be supported, where goods have been conditionally deposited, before condition performed. (*Reeves* v. *Capper*, M. T. 1838, C. P., 5 Bing. N. S. 136; S. C. 6 Scott, 877). As, where a vendee is to pay a certain sum according to agreement before he has possession, he cannot maintain trover until he has done so. (*Norris* v. *Williams*, T. T. 1833, Ex., 1 C. & M. 842). Where the right to sue for the recovery of a chattel is to depend on an investigation of another, such investigation is a condition precedent to maintain an action. (*Brind* v. *Hampshire*, E. T. 1836, Ex., 1 M. & W. 365). A vendee of goods acquires by the contract of sale a right of property, but not a right of possession until he pays the vendor the price. (*Bloxam* v. *Morley*, M. T. 1825, K. B., 4 B. & C. 951; S. C. 6 D. & R. 407). Vendee of an article to be made cannot maintain trover before it is finished. (*Laidler* v. *Burlinson*, E. T. 1837, Ex., 2 M. & W. 602). A vendor, who parts with the possession of his goods, "to be paid for on delivery," receives a cheque, which is dishonoured, and which the vendee has no reasonable ground to expect would be paid, may maintain trover, as no property passes, the transaction being fraudulent. (*Hawse* v. *Crowe*, T. T. 1826, N. P., 1 R. & M. 414).

Where the plaintiff, in trover for goods, was proved to have sworn that the goods described in her schedule, upon taking the benefit of the Insolvent Act, belonged to others:—Held, that such oath did not estop her from claiming them in the action, although the contradiction was for the consideration of the jury. (*Thornes* v. *White*, M. T. 1836, Ex., 1 Tyrw. & G. 110). B., having made a post-nuptial settlement on his wife, obtained from the trustees the title-deeds of the property thereupon, and deposited them with his bankers as a security for money advanced:—Held, that the trustees were entitled to recover the deeds, the bankers not being purchasers within the 27 Eliz. c. 4, s. 2. (*Harrison* v. *Dorrien*, T. T. 1832, C. P., 9 Bing. 76). Where I., a merchant in Ireland, employed the plaintiffs as his factors at Liverpool, and shipped a full cargo of oats on board a boat, No. 604, and took a boat receipt or bill of lading from the master, acknowledging the receipt of the oats deliverable in care for, and to be shipped to, the plaintiff in Liverpool. On the same day I. received from the master of another boat, No. 54, a like receipt, but no part of the cargo was shipped, although prepared for loading; and he wrote to the plaintiffs that he "had valued on them for £—— against those oats," and inclosing the receipts.

(*b*) Of the conversion, demand and refusal*.

Verrall *v.* **Robinson**, T. T. 1835. Ex. 2 *C., M. & R.* 495.

In trover for a chaise, it appeared that a third party had hired it from the plaintiff, and placed it at livery with the defendant, and whilst with him it was attached by process out of the sheriff's court:—Held, that, being in custody of the law at the time it was demanded of the defendant, the refusal was not a conversion.

When a chattel is in the custody of the law at the time of demand, there is no conversion.

They accordingly accepted the bill, and remitted it to I. In the meantime the defendant, a creditor of I., pressing him for security, he consented to give an order on his agent in Dublin to deliver the cargo of No. 604:—Held, that, on the acceptance of the bill, the plaintiff acquired a complete title to the cargo of that boat; but that, as to the second cargo, there being nothing at the time on which the undertaking of the boat-master could operate, and the intended cargo being afterwards otherwise appropriated by I., the plaintiff could only support trover for the former cargo. (*Bryant* v. *Nix*, H. T. 1839, Ex., 4 M. & W. 775). Where, in trover for copper ore, it was proved that the plaintiff was in possession of land in which he sunk a shaft, and raised the ore in question; and the same witness, on cross-examination, proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft:—Held, that this was primâ facie evidence of the plaintiff's title to the ore which must be left to the jury. (*Rowe* v. *Brenton*, M. T. 1828, K. B., 8 B. & C. 737).

Upon a lease by overseers, &c., of parish lands, with a covenant that it should be lawful for the lessee to take all manure, &c., from the poor-house, he covenanting to find straw for the use of the poor:—Held, that he had not a vested interest in the manure so as to support trover against a succeeding overseer carrying away the manure and using it upon his own farm, though made from straw furnished by the plaintiff. (*Sowden* v. *Emsley*, 1820, N. P., 3 Stark. 28). And where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds:—Held, that the defendants, having sold the goods, could not be sued for them in trover by the original owner. (*Stierneld* v. *Holden*, E. T. 1825, K. B., 4 B. & C. 5). A bill given for a specific purpose, which is abandoned, may be recovered by the acceptor in trover. (*Evans* v. *Kymes*, H. T. 1831, K. B., 1 B. & Ad. 528).

The question of ownership is a question for a jury. (*Pickard* v. *Sears*, E. T. 1837, Q. B., 2 N. & P. 488; S. C. 6 Ad. & E. 469; see 4 M. & R. 468; 9 B. & C. 686).

* Assignees of a bankrupt cannot maintain trover on the ground of fraudulent preference without shewing a demand and refusal. (*Jones* v. *Fort*, E. T. 1829, K. B., 9 B. & C. 764). Where the plaintiffs deposited bills with bankers, who handed them over with other securities to A. B., and became bankrupt the following day; A. B. received the proceeds of some, and handed over the amount and the remaining bills to the defendants as soon as they were appointed assignees:—Held, that the latter were not liable in trover for the bills of which the proceeds had been so received, it appearing that the demand had been made on A. B.; but the assignees having received the proceeds of some of the bills before any demand on them:—Held, that they were, notwithstanding, liable in trover for them. (*Tennant* v. *Strachan*, T. T. 1829, N. P., 1 M. & M. 377; S. C. 4 C. & P. 31). Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds and apply them in a specified way, if the creditor, after an act of bankruptcy by such drawer, gives up the original bill to the acceptor, (taking another bill in lieu of it), this is a conversion by the creditor, and the assignees of the drawer may support trover. (*Robson* v. *Rolls*, M. T. 1832, N. P., 1 M. & Rob. 239). A., who was paying his addresses to a lady, lost her letters, and two memorandum-books containing remarks of his own; B. found them, and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others; A. sent a person to demand them of B., who, at first, refused to given them up at all, but, before the person left, said he would not give them to him, but would to C. or D.; C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying, that he had made a sacrifice to obtain the

JONES *v.* CLIFF, E. T. 1833. Ex. 1 *C. & M.* 540; S. C. 3 *Tyrw.* 576.

There need be no demand, if defendant be not in a situation to deliver up the article.

IN an action of trover, it appeared that the defendant, having been employed by the plaintiff to take goods out of pawn, upon being applied to for them, with an offer to allow him on account any sum paid, merely replied that he had parted with them, and refused to say to whom.

The Court held, that no formal tender of the money paid was necessary to enable the plaintiff to maintain trover, the defendant not being in a situation to deliver them up.

III. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE.

PEER *v.* HUMPHREY, H. T. 1835. K. B. 4 *N. & M.* 430; S. C. 2 *Ad. & E.* 495.

A party who has prosecuted a stealer of goods to conviction may maintain trover against the vendee *.

THE defendant purchased property feloniously taken from the plaintiff not in market overt, but bonâ fide, and who, after notice, again sold the goods in market overt. The plaintiff having prosecuted the felon to conviction—

The Court held, that he was entitled to recover the value in trover from the defendant.

See 2 *T. R.* 755; 5 *Id.* 175.

letters:—Held, that there was a conversion of the whole; but the verdict was only for nominal damages. (*Clendon* v. *Dinneford*, T. T. 1831, N. P., 5 C. & P. 13). A refusal to deliver up by a party having a lien, not on that but upon other grounds, is a conversion without tendering the amount of lien. (*Thompson* v. *Trail*, M. T. 1826, K. B., 6 B. & C. 36). But when a party receives chattels from another having a temporary right, and they are sold by him, it is no conversion without a demand of possession. (*Ferguson* v. *Christall*, H. T. 1829, C. P., 5 Bing. 305). In trover for chalk dug from plaintiff's wastes, it appearing that the plaintiff, a bailiff, had demanded payment for it, but not whether as for rent, and the refusal being on the score of poverty, and not shewing any disclaimer of the plaintiff's title, a new trial was granted. (*Williams* v. *Plumridge*, E. T. 1833, C. P., 2 Scott, 799). Semble, that the attachment by process from the sheriff's court in London of property in the hands of the guarantee is not such a conversion as will enable the owner to maintain trover. (*Mallalieu* v. *Laugher*, M. T. 1828, N. P., 3 C. & P. 551). The servant of the defendant, a coach-spring maker, received a spring of the plaintiff to repair, and promised to bring it back by a certain hour. The defendant, after that, refused to return it without being first paid for the repair:—Held, not a sufficient conversion to support trover. The action, if any will lie, should be special assumpsit. (*Fairman* v. *Grimble*, E. T. 1826, N. P., 2 C. & P. 266).

Where the defendant had at first refused to return the goods, but subsequently, and before the issuing the writ, offered to do so:—Held, that, demand and refusal not being conclusive evidence of conversion, the action could not be maintained. (*Hayward* v. *Seaward*, E. T. 1832, C. P., 1 M. & Scott, 459). A letter, demanding the deed sought to be recovered in trover, may be read by the plaintiff as notice to the defendant, although it will not be evidence of any statement made in it, only that the defendant was informed so. (*Whitehead* v. *Scott*, 1830, N. P., 2 M. & M. 2). Where A. purchased goods of B. for C., and paid for them by the acceptance of C., who becoming bankrupt, A. delivered back the goods to B.:—Held, that it was evidence to go to a jury of a joint conversion. (*Robson* v. *Alexander*, H. T. 1828, C. P., 1 M. & P. 448).

* A. received the invoice and wharfinger's receipt, on which he advanced money:—Held, on the arrival of the cargo, he might maintain trover. (*Hall* v. *Griffin*, M. T. 1833, C. P., 10 Bing. 246; S. C. 3 M. & Scott, 732). The ad-

LONGSTAFF *v.* MEAGOE, M. T. 1834. K. B. 4 *N. & M.* 211; S. C. 2 *Ad. & E.* 167.

A party having the same right to fixtures as possession is not liable in trover*.

TENANT mortgaged a leasehold, which he afterwards assigned and delivered possession of to the assignees, and afterwards the mortgagee took forcible possession from the assignees.

The Court held, that taking such forcible possession of the house was no conversion of the fixtures and other articles to which the assignees of the tenant were entitled.

ministrator of the mortgagee of coal veins, barges, &c., may maintain trover against a canal company who seizes them for toll. (*Fraser* v. *Swansea Canal Company*, E. T. 1834, K. B., 3 N. & M. 391; S. C. 1 Ad. & E. 354). So, where the goods are taken wrongfully out of a bailee's possession, trover may be maintained, either by the bailor or bailee. (*Nicholls* v. *Bastard*, M. T. 1835, Ex., 1 Tyrw. & G. 156; S. C. 2 C., M. & R. 659). A bailee who resists an action must stand or fall by the rights of his bailor. (*Wilson* v. *Anderson*, M. T. 1835, K. B., 1 B. & Ad. 450). If the miller to a vendor of corn receives an order from such vendor to deliver a quantity of flour to the vendee, and actually delivers a part under several sub-orders from the agent of the vendee, and afterwards refuses to deliver the remainder, on the ground of his having no more of the vendor's flour in his possession, the vendee may maintain trover against him, and will not be put to bring a special action of assumpsit on an implied promise to deliver the whole. (*Smith* v. *Cook*, E. T. 1826, N. P., 2 C. & P. 276). But a father who has given a son (sixteen years of age) chattels cannot sue for them, the property being in the latter. (*Hunter* v. *Westbrook*, H. T. 1827, N. P., 2 C. & P. 578). A tenant who has quitted premises, leaving fixtures, cannot sue his landlord for taking possession of them. (*Lyde* v. *Russell*, M. T. 1830, K. B., 1 B. & Ad. 394).

Where the plaintiffs (brokers) purchased for T. and P. goods, and entered them in their books, charging brokerage to both parties, but paid for the goods, and handed them over to T. and P., with bills and parcels in their own names, those of the buyer and seller never having been communicated; plaintiffs delivered the warrants to T., and received a cheque for the amount, with the charges; T. deposited the warrants with defendant as securities to cover acceptances given by him, with a view of raising money and absconding; the defendant had sold the goods before any demand made by the plaintiffs, and T. and P. were subsequently declared bankrupts. In trover by plaintiffs for the goods—Held, first, that they must be taken to have dealt with both parties as principals, and that, if T. obtained the warrants from the plaintiffs with the design of raising money and absconding, no property could be vested in the partnership by such a transaction; but if he conceived the design of fraud after he obtained possession of the warrants, the plaintiffs could not recover. (*Kilby* v. *Wilson*, M. T. 1825, N. P., 1 R. & M. 178).

In trover against an executor, under the stat. 3 & 4 Will. 4, c. 42, s. 2, for a watch alleged to have been converted by the testatrix within six months next before her death, it was proved that the testatrix, about eighteen months before her death, refused on demand to deliver the watch to the plaintiff, and made a gift of it to another person; that the latter restored it to her twelve months previous to her death, to enable her to raise money on it by pawning; and that, within the six months, on another demand on behalf of the plaintiff, she said she would consult her solicitor:—Held, that the testatrix, on regaining possession of the watch from the party to whom she had given it, was capable of committing a new act of conversion; that, in the absence of proof that she had actually pawned it, it was to be presumed to have continued in her possession until the time of the second demand and refusal, and that the omission of the Judge to leave that presumption as a question for the jury was no mis-direction, or ground for a new trial. (*Richmond* v. *Nicholson*, M. T. 1839, C. P., 8 Scott, 134).

Churchwardens and overseers have not such a property in the account-books of a late surveyor of the highways as to enable them to maintain trover for them; their remedy being under the stat. 13 Geo. 3, c. 78, s. 48. (*Addison* v. *Round*, 1836, N. P., 7 C. & P. 285).

* Trover does not lie against a party having a lien. (*Owen* v. *Knight*, M. T. 1837, C. P., 6 D. P. C. 244; S. C. 4 Bing. N. S. 54). A party cannot maintain trover against a constable for a wrongful taking of goods under a justice's

IV. RELATIVE TO STAYING PROCEEDINGS, AND BRINGING THE CHATTEL INTO COURT.

EARLE *v.* HOLDERNESS, H. T. 1838. C. P. 4 *Bing.* 462; S. C. 1 *M. & P.* 254.

The Court will grant a rule to stay proceedings on bringing chattels into Court, and order plaintiff to pay costs if he proceed in the action and fail*.

IN trover for several letters—

The Court ordered the proceedings to be stayed, on the defendant's delivering to the plaintiff one of the letters, and paying him the costs of the suit, and of the application, if the latter would consent to accept thereof in discharge of the action; but if he would not accept thereof, then they ordered that he should be at liberty to proceed; but that, if he did not recover damages for the other letters, or recover nominal damages only for that delivered up, he should pay the costs of the action.

warrant, without joining the justice as a co-defendant, if perusal and copy of the warrant have been given under the stat. 24 Geo. 2, c. 44, s. 6. (*Lyons* v. *Golding*, 1829, N. P., 3 C. & P. 586).

A. let a horse on hire to B. for one month; B. kept it for two months, and then sold it to C.:—Held, that A. might recover the value of the horse from C., although C. had acted bonâ fide, and had paid B. the full value. (*Shelley* v. *Ford*, 1832, N. P., 5 C. & P. 313). A., having been bail for D., went, accompanied by B. and C., to the lodgings of D., telling her that B. and C. were officers, who would take her to gaol if she did not give him security for his debt; B. and C. were not officers, and had no authority to take D.; D. gave A. a number of articles, and signed a paper stating that the articles were deposited with A. for security, and that he might sell them if he was not paid in forty-two days:—Held, that D. might recover the value of the articles in trover, and that, as A., B., and C. acted in concert, the verdict must pass against all three, although it appeared that B. and C. never had any of the goods. (*Bloomfield* v. *Blake*, T. T. 1833, N. P., 6 C. & P. 75).

A. had pledged goods to B. for a debt; B. died, and the parish officers took the goods and gave them to J., the carpenter who made the coffin of B., on condition of his paying B.'s rent and the funeral expenses:—Held, that, by taking these goods, the parish officers became executors de son tort; and that, if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment as to re-vest the right of possession in A.; but if the parish officers merely relinquished their possession, and let J. take possession, this would not make the parish officers liable in trover, as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion. (*Samuel* v. *Morris*, 1834, N. P., 6 C. & P. 621).

A person having a bill to take up, applied to a friend for assistance, who, not having cash, drew and indorsed a bill, and gave it him to get discounted, that he might be able to lend him the money; the person so intrusted also indorsed the bill, and left it with a bill-broker for discount; the bill-broker, being indebted to a widow who carried on business as a coal-merchant, took the bill to her counting-house and indorsed it, and there gave it to her son, who managed the business for her, and who entered it in the cash-book as so much received on account. There was contradictory evidence as to the son's knowledge, at the time he received the bill, of the circumstances under which it had been obtained; but he, on being informed of them afterwards, refused to give the bill to the drawer, who brought an action of trover against him for it. The jury found that the bill was not taken bonâ fide, and without notice of the circumstances; and it was held that the action was maintainable against the son, and need not be brought against the mother. (*Cranch* v. *White*, M. T. 1834, N. P., 6 C. & P. 767; S. C. 1 Bing. N. S. 414; S. C. 1 Scott, 314).

* In trover, the Court will, on application of the defendant, stay proceedings on delivery of a portion of the goods, and payment of costs and any damage; and in the event of the plaintiff refusing such terms, the Court will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequently to such delivery, in the event of his not recovering in respect of some other articles than those delivered up, or more than nominal damages in respect

V. RELATIVE TO THE PLEADINGS.

(*a*) Declaration.

SHANNON *v.* OWEN, M. T. 1827. K. B. 1 *M. & R.* 392.

Under declaration for a fishing smack, with apparel and appurtenances, a boat cannot be recovered *.

IN an action of trover for "a smack, with the apparel and appurtenances thereunto belonging," it appeared that the plaintiff had been in possession of the smack in question, and during that possession had expended money in repairs, had provided a new boat, and furnished other apparel for the vessel, for which he sought to recover.

Per Cur.—We do not decide whether the boat comes properly within the meaning of the term, "appurtenances or apparel;" but the plaintiff, in order to retain the verdict, has been obliged to contend that he has recovered for what was separate from the ship. His claim in the declaration is for "apparel and appurtenances thereunto belonging."—Rule absolute for nonsuit.

(*b*) Pleas.

STANCLIFFE *v.* HARDWICK, E. T. 1835. Ex. 2 *C. M. & R.* 1; S. C. 3 *D. P. C.* 762.

The plea of not guilty denies the conversion only, and does not enable the defendant to shew his right of detainer †.

TO a count in trover the defendant pleaded not guilty, and, at the trial, proposed to offer evidence to shew that he was tenant in common with the plaintiff of the property claimed in the declaration, and had disposed of it in payment of partnership debts:—Held, that the Judge was right in refusing to admit the evidence, not because the defendant had, by his plea, admitted the plaintiff's right of property

of those delivered up. (*Peacock* v. *Nichols*, E. T. 1840, Ex., 8 D. P. C. 367). In trover, assignees and sheriffs are viewed as private persons, even with respect to staying proceedings. (*Gibson* v. *Humphrey*, E. T. 1833, Ex., 1 C. & M. 544; S. C. 2 D. P. C. 68; S. C. 3 Tyrw. 588).

* Special damage may be recovered in trover if laid in the declaration. (*Davis* v. *Oswell*, 1837, N. P., 7 C. & P. 804). Where, in trover by the assignee, the conversion was laid in his time, being, in fact, before the insolvency, the Court, considering that the real question to be tried was not thereby varied, allowed the plaintiff to amend. (*Norcutt* v. *Moltram*, H. T. 1839, C. P., 7 Scott, 176).

† By Reg. Gen., H. T. 2 Will. 4, the plea of not guilty to an action for converting the plaintiff's goods denies the conversion only, and not the plaintiff's title to the goods. In trover, plea, not guilty:—Held, that the defendant could not deny the plaintiff's property, although the only evidence was of a conversion by demand and refusal. (*Barton* v. *Brown*, T. T. 1839, Ex., 5 M. & W. 298). Under not guilty a lien cannot be given in evidence. (*White* v. *Teale*, T. T. 1840, Q. B., 4 P. & D. 43). The Court will allow several pleas claiming different liens. (*Leuckhart* v. *Cooper*, H. T. 1835, C. P., 3 D. P. C. 415; S. C. 1 Bing. N. S. 509; S. C. 1 Scott, 481). But where the pleas in trover raised questions on the right of lien on the Factors' Act, the Court allowed pleas thereon to be joined with the pleas of not guilty, and that the paintiffs were not lawfully possessed of the goods. (*Janlerry* v. *Britton*, E. T. 1836, C. P., 4 Scott, 380). Under a plea of denial of possession a sale may be shewn. (*Pickard* v. *Sears*, E. T. 1837, K. B., 6 Ad. & E. 469).

If, after the jury are sworn, it be discovered that, to a declaration in trover, the defendant has pleaded non assumpsit, the Judge will discharge the jury unless both parties consent to an amendment. (*Bent* v. *Benyon*, H. T. 1834, N. P., 6 C. & P. 217).

The plea of no property in the plaintiff, means no property as *against the defendant*. (*Nicholls* v. *Bastard*, M. T. 1835, Ex., 1 Tyrw. & G. 156; S. C. 2 C., M. & R. 659).

to such an extent as precluded him from setting up the community of interest therein, but because the present defence was one which confessed the conversion, but avoided it by a justification, and therefore ought to have been pleaded specially.

(*c*) NEW ASSIGNMENT*. See, also, tit. *New Assignment.*

In an action of trover for household furniture, &c., where the declaration stated that the plaintiff was possessed of the goods as of his own property, the defendants, who were the assignees of a bankrupt, pleaded, first, that they were not guilty of the conversion; and, secondly, that the plaintiff was not possessed of the goods as of his own property: it was held at Nisi Prius, that, in order to admit of the rights of the defendants as assignees, on the ground that the goods were in the order and disposition of the bankrupt, that defence should have been specially pleaded; but the Court of Exchequer were of opinion, that the defence relied upon was evidence under the plea that the plaintiff was not possessed of the goods as of his own property. (*Isaacs* v. *Belcher*, M. T. 1838, N. P., 8 C. & P. 714). Plea, in trover, that one R., lawfully in possession, pledged the goods to the defendant:—Held, bad on demurrer. (*Jaullery* v. *Britten*, H. T., 1838, C. P., 4 Bing. N. S. 242). Upon the plea in trover, that plaintiff was not possessed of the goods:—Held, that the defendant could not shew that, at the sale of the goods, where the plaintiff had bought them, they were bought with a knowledge that they had been fraudulently removed; as, since Reg. Hil. 4 Will. 4, that should have been pleaded. (*Howell* v. *White*, 1837, N. P., 2 M. & Rob. 400).

Where the defence is, that the alleged conversion took place by plaintiff's authority, it should be pleaded. (*Vernon* v. *Shipton*, M. T. 1836, Ex., 2 M. & W. 91).

To trover for sheep, the defendant pleaded that A. was entitled to hold a market in a certain close in K., in the county of Hereford, and that, as the servant of A., he distrained the sheep for toll, "quæ est eadem" &c., and concluding with a special traverse of the taking at any place out of the close. The venue was laid in Hereford, but no parish or place was specified in the declaration:—Held, on special demurrer, that the plea was bad, on the ground that it contained two traverses of the same matter. (*Cardwardine* v. *Watkins*, T. T. 1839, Ex., 7 D. P. C. 484).

A plea alleging chattels to be the property of the defendant, and which are proved to be the property of the defendant and the plaintiff, is not supported. (*Farrer* v. *Beswick*, T. T. 1836, Ex., 1 M. & W. 682; S. C. 1 Tyrw. & G. 1053).

To trover for trees, defendant pleaded that he was seised in fee of a close, and that he cut the trees growing thereon and delivered them to R. R., to be kept for him; that R. R. delivered them to plaintiff, whereupon defendant took them from plaintiff, which was the conversion complained of:—Held good, on special demurrer. (*Morant* v. *Sign*, M. T. 1836, Ex., 5 D. P. C. 319). In trover against three defendants by the assignee of a bankrupt, two of them pleaded that, more than two months before the issuing of the fiat, the plaintiff, as assignee, to wit, by reason of the relation of his title as such to the time of the bankruptcy, was the owner and entitled to the possession of the goods in the declaration mentioned as of his own property as assignee, and the bankrupt, subject thereto, was possessed of, and entitled to, the same; and after his bankruptcy, and more than two months before &c., one of the defendants bonâ fide bought, at a fair price, from the bankrupt the said goods, and the two defendants had no notice of any act of bankruptcy, whereby the former defendant became possessed of the goods as of his own property, and in his own right; and the other defendants, as his servants, converted the said goods, which is the grievance in the declaration mentioned; without this, that at the time of the said conversion the goods were the property of the plaintiff, or of right belonged to him as assignee; conclusion to the country:—Held, on special demurrer, that, as the former part of this plea was in confession and avoidance, the traverse was wrong, and therefore the plea was bad. (*Pearson* v. *Rogers*, M. T. 1838, K. B., 1 P. & D. 302).

The Statute of Limitations runs from the conversion; and a conversion of part does not extend to the whole. (*Philpott* v. *Kelley*, E. T. 1835, K. B., 4 N. & M. 611).

* Where a lien is pleaded the plaintiff may new assign, alleging that the action is brought for other goods than those on which the lien attached. (*Bolton* v. *Sherman*, E. T. 1837, Ex., 2 M. & W. 395).

(*d*) Replication*. See, also, tit. *De injuria.*

VI. RELATIVE TO THE EVIDENCE†.

VII. RELATIVE TO THE MODE OF PROCEEDING AT THE TRIAL‡.

* Trover for a bill of exchange. The defendant pleaded that the plaintiff indorsed the bill in blank, and that R. became the holder; and the defendant, believing that he had authority to dispose of it, took it as a pledge or security for a debt. The plaintiff replied, that the defendant knew that R. had no authority to pledge or deposit the bill; and the Court held the replication good, as traversing the material allegation in the plea. (*Hilton* v. *Swan*, E. T. 1839, C. P., 7 D. P. C. 417).

† In trover for goods (detained beyond the period allowed) for a distress for rent due from a third party, the Court refused to compel the defendant to produce an agreement in his possession, entered into by such third party, authorizing the defendant to remain in possession of the distress for the purpose of being inspected, and, if necessary, stamped. (*Lawrence* v. *Hooker*, M. T. 1825, C. P., 5 Bing. 6). In trover for a deed, the plaintiff may prove the nature and contents without calling for it, the defendant being at liberty to produce it as part of his case; (*Whitehead* v. *Scott*, 1830, N. P., 2 M. & M. 2); but where a written demand in trover, made by A. B., stated that he held the plaintiff's power of attorney; and the defendants' attorney said, in the presence of the defendants, that he would admit the service of the demand and tender of the charges, but that the defendants declined to deliver the goods, and would leave A. B. to seek such remedy as the law would give him:—Held, that it was not necessary, on the trial of the cause, to produce the power of attorney. (*Leuckart* v. *Cooper*, T. T. 1835, N. P., 7 C. & P. 119). In trover for wine warrants:—Held, that proof, that, on an application to the defendant, as administratrix, she referred to her attorney, in whose hands she said they were, was not sufficient evidence of a conversion. (*Canot* v. *Hughes*, H. T. 1836, C. P., 2 Bing. N. S. 448; S. C. 2 Scott, 663). A defendant received from A. some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt, to which he replied that he had some belonging to A., upon which the messenger desired him to take care of it, and not part with it, as more would be heard of it; afterwards, the defendant allowed the bacon to be returned by A. to the person from whom A. had received it:—Held, that this was evidence of a conversion. (*Hawkes* v. *Dunn*, T. T. 1831, Ex., 1 C. & J. 519; S. C. 1 Tyrw. 413). Where, in trover, upon the issue of no property in the plaintiff, the defendant having shewn himself in possession for four years after a gift by a party to whom he was administrator:—Held, that, having put in the letters of administration, evidence of declarations by his deceased testator was admissible against him. (*Smith* v. *Smith*, T. T. 1836, C. P., 3 Bing. N. S. 29; S. C. 3 Scott, 352). So, in trover for goods sent by the plaintiff to the defendant, a packer, and expressed in the receipt to have been received on account of the plaintiff for M., the party to whom they had been sold:—Held, that evidence of the usage of trade was admissible to explain the meaning of ambiguous terms in such receipt. (*Bowman* v. *Horsey*, 1836, N. P., 2 M. & Rob. 85).

Where, by the particulars, the action was brought for one cow, and the plea alleged that the goods in the declaration were the property of H., who fraudulently sold them to plaintiff to avoid an execution against the goods of H., and that the defendant, the sheriff, seized them in execution; by the replication, issue was taken that H. did not fraudulently sell them to the plaintiff; and by the evidence it appeared that the plaintiff had lent a cow to H., that the goods of H. were fraudulently sold to avoid the execution, and the principal part to the plaintiff, but neither the plaintiff's cow, nor any cow, was sold at such sale:—Held, that the plea was not sustained, and that the plaintiff was entitled to recover on issue. (*Nicholls* v. *Bastard*, M. T. 1835, Ex., 1 Tyrw. & G. 156; S. C. 2 C., M. & R. 659).

To shew that the defendant received a chattel merely as agent, he cannot give in evidence accounts between him and the principal, describing himself as agent, but the latter must be called. (*Spargo* v. *Brown*, M. T. 1829, K. B., 9 B. & C. 935).

‡ Upon an action of trover, brought by order of the Vice-Chancellor to try the validity of a commission directing the finding and conversion to be admitted:—Held, that the plaintiff was nevertheless entitled to begin. (*Turberville* v.

VIII. RELATIVE TO THE DAMAGES*.

IX. RELATIVE TO THE VERDICT†.

X. RELATIVE TO AMENDMENTS‡. See, also, tit. *Amendment.*

XI. RELATIVE TO ARRESTING THE JUDGMENT.

SHEEN *v.* RICKIE, E. T. 1839. Ex. 5 *M. & W.* 175; S. C. 7 *D. P. C.* 335.

After verdict judgment will

IN trover against three defendants, the declaration alleged a loss of certain goods, chattels, and "fixtures," (specifying them), and

Patrick, 1831, N. P., 4 C. & P. 557). In trover, where two defendants defend by the same attorney, and in the same interest, but one appears by counsel, and the other in person, the counsel only is entitled to address the jury; but both he and the defendant appearing in person may cross-examine the witnesses. (*Perring* v. *Tucker*, T. T. 1829, N. P., 1 M. & M. 391; S. C. 4 C. & P. 70).

* In trover for a bill, the jury may give interest, although no special damage is alleged in the declaration. (*Paine* v. *Pritchard*, H. T. 1827, N. P., 2 C. & P. 558). In an action of trover, the general rule is that the damages should be the value of the thing taken; and if, in trover, the defendant only plead that he did not convert the goods, his counsel will not be allowed to cross-examine the plaintiff's witnesses to shew, in mitigation of damages, that the goods taken really belonged to a third person. (*Finch* v. *Blount*, 1836, N. P., 7 C. & P. 478). The declaration in trover being general, the plaintiff must shew what goods the defendant took into his possession, the value of which is the proper measure of damages. (*Cook* v. *Hartle*, 1838, N. P., 8 C. & P. 568).

Where the owner of adjoining land had worked coal-mines within the land of the plaintiff:—Held, that, the plaintiff being entitled to the coals as chattels, the value of them when brought to the pit's mouth was the proper estimate of the damages. (*Martin* v. *Porter*, T. T. 1839, Ex., 5 M. & W. 351).

In trover for goods, the defendant pleaded payment of money into Court, and the plaintiff replied, that he had sustained more damages; the defendant paid into Court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however, found for the defendant, and the Court refused to set aside the verdict. (*Evans* v. *Lewis*, E. T. 1835, Ex., 3 D. P. C. 819).

Under special circumstances, the Court estimated the value of certain billettes of the Peruvian government for 16,011 dollars, not by the market value of such billettes, but at the market value of a bill for 16,011 dollars, drawn on a safe house in Lima. The special circumstances were, the billettes being given on the remonstrance of the British government as a compensation for an act of injustice to the plaintiffs, which rendered the billettes more likely to be paid in full on the presentment of the plaintiffs. (*Delegal* v. *Naylor*, E. T. 1831, C. P., 7 Bing. 460).

† Where, in trover for goods, which both plaintiff and defendant claimed under an assignment from a third party, and which, by the verdict, were found to be the property of the plaintiff; after the verdict the goods were distrained in the defendant's hands, and he paid the amount of the rent claimed; the Court, upon motion, allowed it to be deducted from the value at the time of the trial which had been given by the jury. (*Plevin* v. *Henshall*, T. T. 1833, C. P., 10 Bing. 24). Upon an application to set aside a verdict on the ground of excessive damages, the Court will not receive any affidavits of the defendant's witnesses, either to explain or add to evidence given by them at the trial. (*Phillips* v. *Hatfield* M. T. 1840, Ex., 8 D. P. C. 882).

‡ After issue joined in trover, and a peremptory rule to try, the Court refused leave to substitute a count in detinue and add one in debt. (*Green* v. *Mitton*, M. T. 1832, K. B., 4 B. & Ad. 369). But where, in trover by the assignee, the conversion was laid in his time, being in fact before the insolvency, the Court, considering that the real question to be tried was not thereby varied, allowed the plaintiffs to amend. (*Norcutt* v. *Mottram*, H. T. 1839, C. P., 7 Scott, 176).

stated a finding by two of the defendants; and then averred that "the said defendants" afterwards disposed of the said goods, chattels and fixtures. After a general verdict for the plaintiff—

not be arrested because the declaration is for fixtures.

The Court held, that the declaration might be considered as laying a conversion by all the defendants; and, secondly, that the term "fixtures" did not necessarily mean things affixed to the freehold, but that it might, and should after verdict, receive an interpretation which would support a declaration in trover.

Trustees.

See, also, tit. *Will.*

GREENHAM *v.* GITTESON, H. T. 1834. C. P. 10 *Bing.* 363; S. C. 4 *M. & Scott*, 198.

BY the settlement, three terms were created in separate trustees for specific objects, with powers of substituting, with the consent and approbation of the several trustees, other premises in the place of those charged, and discharging the latter.

Where trustees' consent is a condition precedent to the execution of a power, it must be obtained*.

The Court held, that the clear intention being that the consent of the trustees should form a condition precedent to the execution of the power, such power was not well executed by deeds, which, although the trustees were respectively parties to them, yet they had not executed.

TENNY *v.* MOODY, E. T. 1825. C. P. 3 *Bing.* 3.

A., BY her will, devised certain hereditaments to her niece for life, and, after her decease, to the uses therein mentioned, subject to a declaration, that, notwithstanding such devise, certain trustees,

Where the trustees were directed to attend

* Where the plaintiffs had acted as trustees, the Court refused to interfere, by striking out one of their names as plaintiff in the action, there being no suggestion of fraud, but a mere refusal to indemnify. (*Emery* v. *Mucklow*, M. T. 1833, C. P., 10 Bing. 23).

A trustee taking under a devise, with a power of leasing, confined singly to the purposes of paying off a debt and legacy, takes only a chattel interest. (*Ackland* v. *Lutley*, H. T. 1839, Q. B., 1 P. & D. 636; S. C. 9 Ad. & E. 879).

The testator devised and bequeathed to several sons and daughters realty and personalty as described in certain schedules annexed to his will, with survivorships and trusts of a very complicated description. There was a freehold house in Southwark, of which the testator was seised at the time of making his will, and which, at the time of his decease, he omitted specially to dispose of; but, by a codicil, attested by one witness only, he declared his intention to be, that that house should go to his eldest son. The will contained the following residuary clause:—"All the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever I give, devise, and bequeath unto my said trustees, their heirs, &c., in trust to divide the same equally amongst my children when my youngest son shall attain the age of twenty-five years, so and in such manner that the shares of each of my children of and in the said residuary estate may be held and enjoyed upon the same trusts, and be subject to the same contingencies and bequests over, as their respective original legacies are subject and liable to under and by virtue of this my will:"—Held, that the freehold in Southwark passed to the trustees under the residuary clause, notwithstanding the difficulty of dealing with it according to the trusts. (*Barclay* v. *Collett*, T. T. 1838, C. P., 6 Scott, 408; S. C. 4 Bing. N. S. 658).

to repairs, as well as to pay over the rents to a feme covert, with power of distraining, &c. they take the legal estate.

therein nominated, should be receivers of the rents, with power to make distresses, to grant leases, to repair and pay other outgoings, and subject thereto, to pay over the clear net rents to such niece (a feme covert) for her sole use, &c. By a codicil, the trustees in such will having died, A. revoked all the devises contained in her will, and devised the same hereditaments to new trustees, their heirs, &c., upon the several trusts, &c., as if they had been originally named as trustees in the will.

The Court held, that the trustees named in the codicil took the legal estate.

Turnpike.

I. RELATIVE TO THE TOLL, AND EXEMPTION FROM, p. 542.

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V. RELATIVE TO THE SUBSCRIPTION TO, AND OF LEASES AND MORTGAGES, 545.

VI. RELATIVE TO THE REPAIRS, 546.

VII. RELATIVE TO APPEALS, 546.

I. RELATIVE TO THE TOLL, AND EXEMPTION* FROM.

* Exemption from toll in 3 Geo. 4, c. 126, explained and amended by 4 Vict. c. 51; see, also, 5 & 6 Will. 4, c. 49. The exemption in the 3 Geo. 4, c. 126, does not apply where the party passes more than 100 yards over the road. (*Pope* v. *Langworthy*, 5 B. & Ad. 464).

Where the act provided that certain tolls should be taken "of every person attending any cattle or carriage, for every horse drawing," &c.; and by another clause, "that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to repass free with the same cattle or carriage:"—Held, that the toll was imposed on the horses, and that a fresh toll could not be demanded on the same horses, although drawing a different coach, and driven by another coachman, being the servant of the same proprietors. (*Norris* v. *Poate*, E. T. 1825, C. P., 3 Bing. 41).

By a local turnpike act (4 Geo. 4, c. 30) persons who had paid any toll for the passing of any horse and carriage through a toll-gate, were exempt from paying the toll again that day; but it was provided, that the tolls payable in respect of horses drawing any stage-coach, diligence, van, caravan, stage-waggon, or other stage-carriage, should pay on repassing:—Held, that the term stage-waggon

II. RELATIVE TO THE CONSTRUCTION OF STATUTES.

Rex *v.* Northleach and Witney Trustees, M. T. 1833. K. B. 5 *B. & Ad.* 978.

A local prior turnpike act is repealed by a subsequent local act, incorporated in the General Turnpike Act*.

A LOCAL act directed the books, &c., to be open to the inspection of all persons; and, by a subsequent local act, inspection was limited to trustees and creditors, which provision was re-enacted in the General Turnpike Act.

The Court held it virtually to repeal the former local act, and to confine the right of inspecting to the latter classes only; and a mandamus was refused.

signified a waggon that went and returned regularly from a fixed place to some other fixed place at certain definite times. (*Reg.* v. *Ruscoe*, T. T. 1838, Q. B., 3 N. & P. 428).

Where the enacting clause of a turnpike act imposed a toll on the horses drawing a coach, and there was a proviso that no person should be liable to pay toll more than once on the same day for passing or repassing with the same horses, cattle, beasts, or carriage:—Held, that a party repassing with the same coach drawn by different horses was liable, notwithstanding the exemption. (*Hopkins* v. *Thorogood*, M. T. 1831, K. B., 2 B. & Ad. 916). By a turnpike act, a certain toll was imposed upon every horse or other beast drawing any carriage, &c.; a certain other toll upon every horse not drawing; and other tolls upon every drove of oxen, &c. There was a proviso, that no collectors should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once and repassing once in the same day through the same or any of the gates on the said roads, such person producing a ticket, denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle:—Held, that a second toll was not payable in respect of the same horses passing once and repassing once in the same day, but drawing a different carriage belonging to the same proprietors. (*Jackson* v. *Curwen*, H. T. 1826, K. B., 5 B. & C. 31). So, where the tolls were imposed upon horses drawing, except where a carriage was affixed to a waggon, although the exempting clause might apply both to the horse and carriage; the Court, adverting to the rule of construction in similar cases, decided in favour of that which would have the effect of relieving the subject from a burden. (*Chambers* v. *Williams*, H. T. 1826, K. B., 5 B. & C. 36, n.)

* The effect of a subsequent statute may only repeal part of a prior one. (*Phipson* v. *Harvett*, M. T. 1834, Ex., 1 C., M. & R. 473; S. C. 5 Tyrw. 54). Where there are two local acts which regulate toll and exemption, and the last act varies the mode of imposing the toll, so as to enlarge an exemption under the old act, the exemption shall prevail, though it be not expressly given by the new act. (*Fearnley* v. *Morley*, H. T. 1826, K. B., 5 B. & C. 25). Where the value of several interests is to be assessed by the jury impannelled under the 3 Geo. 4, c. 126, s. 85, (the Turnpike Act), an inquisition, finding one gross sum only, is invalid. (*Rex* v. *Trustees of Norwich and Watton*, M. T. 1836, K. B., 1 N. & P. 32).

Where a local turnpike act described the road as from A. to B., and authorized the taking tolls at every toll-gate on the said road, and continued the liability to repair of the counties, persons, &c., before liable; there was also an exemption as to persons not passing more than 100 yards on the said road:—Held, that such exemption did not extend to the passing along a greater portion of the road than 100 yards in all. Where part was over the portion of 100 yards, adjoining a county-bridge, and less than 100 yards of the other part of the turnpike, semble, the trustees would be authorized in applying their funds in the repair of the part adjoining the bridge, on default of the county. (*Bussey* v. *Storey*, M. T. 1832, K. B., 4 B. & Ad. 98). A road is to be considered a turnpike-road on which toll-gates may be lawfully erected, and tolls lawfully taken. (*Northam Bridge Roads Company* v. *London and Southampton Railway Company*, E. T. 1840, Ex., 6 M. & W. 428).

III. RELATIVE TO THE TRUSTEES AND COMMISSIONERS.

DELANE *v.* HILLCOAT, H. T. 1829. K. B. 9 *B. & C.* 310; S. C. 4 *M. & R.* 175.

It is a question for the jury whether a trustee accepting the office of treasurer made a profit, within the 3 Geo. 4, c. 126, s. 65*.

A TRUSTEE, under a local act, was appointed treasurer, and continued to hold both offices. There was no salary attached to the latter. The trustee executed the office by deputy; the deputy being an attorney, who received and paid all the money, and who mixed the money and used it in common with his own. He occasionally assisted his clients with loans of money. There was always a balance in the hands of the deputy in favour of the trust; but the trustee himself did not derive any benefit from the office. In an action against the trustee, under the above statute, *Gaselee*, J., was of opinion that, if the office in question were an office of profit, it was immaterial whether the trustee himself derived the profit or not; and that the question whether the office was an office of profit, was a question for the jury. The jury having found that the office was an office of profit, and that profit was made of it—

The Court held, that the defendant was liable.

IV. RELATIVE TO THE CLERK.

REX *v.* TRUSTEES OF WREXHAM, M. T. 1836. K. B. 5 *Ad. & E.* 581.

The clerk cannot be dismissed

THE commissioners of roads discharged the clerk, the notice required by 4 Geo. 4, c. 95, ss. 39, 43, not having been given,

* Acting as trustee is sufficient evidence without producing the deed of appointment. (*Doe* d. *Baggaley* v. *Hares*, H. T. 1833, K. B., 4 B. & Ad. 435; S. C. 1 N. & M. 237). Under 3 Geo. 4, c. 126, s. 86, a discretionary power is vested in trustees as to stopping up highways. (*De Beauvoir* v. *Welch*, T. T. 1827, K. B., 7 B. & C. 266; S. C. 1 M. & R. 81).

A trustee letting out his horses and cart for hire to a contractor on the road is within 3 Geo. 4, c. 126, s. 65. (*Towsey* v. *White*, M. T. 1825, K. B., 5 B. & C. 125). Where trustees of several gates have power to advance or lower tolls, they can only alter all of them or none. (*Rex* v. *Bury and Stratton Road Trustees*, T. T. 1825, K. B., 4 B. & C. 361; S. C. 6 D. & R. 368).

Money borrowed of the chairman of the trustees, not in conformity with the statute, renders him personally liable. (*Parrott* v. *Eyre*, H. T. 1834, C. P., 10 Bing. 283; S. C. 3 M. & Scott, 857). Where, upon the division of a turnpike road, after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of B., broke down his fence to make a passage from the new road to the close of A., but did not put up a gate or fence to protect the latter close:—Held, that the trustees were wrong-doers, and that B. was responsible for their acts. (*Winter* v. *Charter*, T. T. 1829, Ex., 3 Y. & J. 308). Where an act directs that actions shall be brought by and against the clerk, and provides for his reimbursement of *costs and charges*, it cannot be intended that he should be personally liable for debt or damages. (*Wormwell* v. *Hailstone*, T. T. 1830, C. P., 6 Bing. 666).

Under the Southampton Paving Acts the jurisdiction of the commissioners:—Held, not to extend to footways on the side of the turnpike road, made and repaired by the trustees of the turnpike, the authorities given to the commissioners being confined to streets and places then or thereafter to be paved. (*Loveridge* v. *Hodsoll*, T. T. 1831, K. B., 2 B. & Ad. 602).

although ordered at a meeting; the omission having been through the misconduct of the clerk himself. without the notice required by the 4 Geo. 4, c. 95.

The Court held the dismissal irregular; and a mandamus was granted to restore him, those sections being to be taken in conjunction.

V. RELATIVE TO THE SUBSCRIPTION TO, AND OF LEASES AND MORTGAGES.

Meigh *v.* Clinton, H. T. 1840. Q. B. 3 *P. & D.* 211.

A project having been formed for making a new line of road, and also a diversion of another road, in certain parts of Staffordshire, previous to an application for an act of Parliament, the following document was drawn up:—"At a meeting of the trustees of the Great Chell and Shelton road, holden this day, it appearing from the estimates laid before it, that, to effect the object which the trustees have in view, viz. the new line from the Albion Inn, in Shelton, to Lane End, and the diversion from Mr. Ratcliffe's manufactory to Sneyd Green, an expense of 4600*l.* will be involved, including the land which will be required; it was proposed that the necessary application be made without delay, in order to raise funds to meet the expenses referred to; and the gentlemen undernamed have proposed to subscribe such sums for the purposes as are set opposite to their respective names, and by which it is proposed to secure the repayment of, with interest, by way of mortgage on the tolls." To this document the defendant's name was added as a subscriber for 50*l.* An act of Parliament was afterwards obtained, under which part of the work was completed. Three calls of 10*l.* each were made upon the subscribers, and a demand was proved upon the defendant for each call, when he promised payment. By 3 Geo. 4, c. 126, s. 82, an agreement in writing is necessary to make a party liable for any sum he may have subscribed towards making or repairing any turnpike road or highway; and in the schedule to the act a form of such agreement is given. By the 9 Geo. 4, c. 77, ss. 6, 7, part of sect. 82 of the former act is repealed. In an action of debt against the defendant for the amount of the three calls— Under 9 Geo. 4, c. 77, the proposal to subscribe, to be binding, must be in writing in the form given by the act.

The Court held, first, that that part of sect. 82 which required an agreement in writing was not repealed by the subsequent statute, but that such agreement was still necessary; secondly, that the document above set out was not an agreement, but only a proposal, upon which the defendant was not liable for calls; and, thirdly, that, as this was not an agreement, no promise by the defendant to pay the calls could have any operation upon it.

Pearse *v.* Morrice, M. T. 1834. K. B. 4 *N. & M.* 48; S. C. 2 *Ad. & E.* 84.

By a local act trustees had power to make leases, provided the lease was duly executed by the trustees, &c., and the rent reserved, payable to the treasurer of the trustees &c., or in default the lease to be null and void. The lease must be in conformity with the statute.

The Court held, that a reservation of rent "to the trustees or their treasurer" was not in accordance with the provisions of the act, and that the lease was void.

DOE *d.* THOMPSON *v.* LEDIARD, H. T. 1833. K. B. 4 *B. & Ad.* 137.

Mortgagees have the legal estate in them.

THE trustees under two several turnpike acts, relating to the same roads, after the passing of the last act, demised to one of several mortgagees such proportion of the tolls arising from the road, and the toll-houses and toll-gates erected for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls. By the last of these acts, the mortgagees under the first are entitled to priority of charge and payment before those who advanced sums for the purpose of completing a new branch of road under the new act.

The Court held, that such mortgagee under the second act might maintain ejectment for the toll-houses and toll-gates, notwithstanding that clause (*Park*, J., dubitante); and that he would be a trustee in possession for the benefit of the prior mortgagees, until they were paid off.

VI. RELATIVE TO THE REPAIRS*.

VII. RELATIVE TO APPEALS†.

University‡.

Unlawful Assembly§.

Use||.

* Under 2 & 3 Vict. c. 81, s. 1, a special sessions have jurisdiction to make an order on the parish surveyors of the highway to pay a certain sum to the trustees of a turnpike road, although all the funds of the turnpike trustees are not exhausted. (*Reg.* v. *Justices of Berks*, T. T. 1840, B. C., 8 D. P. C. 727).

† Under the 4 Geo. 4, c. 95, ss. 80, 87, the notice of appeal against an order of justices, requiring the surveyor of the highways to perform statute-work and pay over composition-money, served within six days after the order in writing served, is sufficient, and not after the making of such order. (*Rex* v. *Justices of Lancashire*, M. T. 1828, K. B., 8 B. & C. 593). Under the General Turnpike Act, which takes away a certiorari, no mandamus lies to rehear an appeal. (*Rex* v. *Justices of West Riding of Yorkshire*, H. T. 1834, K. B., 3 N. & M. 86).

‡ Where the franchise of granting alehouse licenses had been always exercised, without opposition, by the Vice-Chancellor of the University, and being recognised in ancient statutes, the Court refused a quo warranto to try its validity; and quære, if such was the subject of quo warranto? (*Reg.* v. *Archdall*, M. T. 1839, Q. B., K. B., 3 N. & P. 696).

§ If parties assemble together for a purpose which, if executed, would make them rioters, but having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly. (*Rex* v. *Birt*, 1831, N. P., 5 C. & P. 154).

|| Where a use is executed by the common law in the same person to whom the seisin is conveyed, a further use to another person cannot be executed by the Statute of Uses: for the statute applies only to cases where the use is not

Use and Occupation.

I. RELATIVE TO WHEN AN ACTION FOR USE AND OCCUPATION CAN OR CANNOT BE MAINTAINED, p. 547.

II. RELATIVE TO BY AND AGAINST WHOM AN ACTION FOR USE AND OCCUPATION CAN OR CANNOT BE MAINTAINED, p. 549.

III. RELATIVE TO FORM OF ACTION, p. 550.

IV. RELATIVE TO THE DECLARATION, p. 550.

V. RELATIVE TO THE PLEAS, p. 550.

VI. RELATIVE TO THE EVIDENCE, p. 551.

VII. RELATIVE TO THE WITNESSES, p. 551.

I. RELATIVE TO WHEN AN ACTION FOR USE AND OCCUPATION CAN OR CANNOT BE MAINTAINED.

How *v.* Kennett, T. T. 1835. K. B. 5 *N. & M.* 1, *questioning* Carter *v.* Warne, H. T. 1830. N. P. 1 *M. & M.* 479.

There must be an actual occupation;

Trustees of an insolvent, to whom he had assigned all his effects, put in a person to carry on the trade and dispose of the stock; but it was never intended by them, nor was any act done, to induce the landlord to believe they took possession as tenants, and the jury found that there was no occupation.

The Court held, that they were not liable in an action for use and occupation.

Edwards *v.* Hetherington, M. T. 1825. K. B. 7 *D. & Ry.* 117; S. C. 1 *Ry. & M.* 268.

and the occupation must be beneficial*.

The plaintiff, who had underlet to defendant from year to year, with his consent put workmen in to repair a party-wall a short time before quarter-day; but the danger and inconvenience therefrom

executed by the common law, and cannot be called into action where a use has once been so executed. Accordingly, a grant to A., to the use of A. in fee, upon trust,—that is to say, to the use of B., with certain trusts and limitations,—and the ultimate use to B. in fee:—Held, that, although the first use might be well executed by the common law, yet the Statute of Uses could not be called in aid to execute the second use to B.; and therefore, that B. had not the legal, but only the equitable, estate, under the ultimate use. The Court cannot presume a reconveyance in order to get rid of an outstanding legal estate; the presumption is one of fact alone, and must be left to the jury. (*Doe* d. *Lloyd* v. *Passingham*, H. T. 1827, K. B., 6 B. & C. 305).

* Saying, "Prove your title and I will pay you," is no recognition of plaintiff's title. (*Cripps* v. *Black*, T. T. 1827, K. B., 9 D. & R. 480).

became so great, that the defendant, with his family and lodgers, were obliged to leave the premises before the quarter-day, and take lodgings elsewhere. The defendant, however, after paying his rent up to Midsummer, occupied the shop until the 5th July, when he quitted, without any notice to plaintiff. The Judge having left it to the jury to say if the defendant had had any beneficial occupation of the premises, who found for the defendant—

The Court refused a new trial on the ground of misdirection.

IZON *v.* GORTON, E. T. 1839. C. P. 5 *Bing. N. S.* 501.

But the action may be maintained, notwithstanding the premises are destroyed by fire*.

THE defendants were tenants, from year to year, of the upper floor of a warehouse, paying rent by the quarter; and a fire occurred accidentally, in the middle of a quarter, which rendered the apartments uninhabitable, in consequence of which the defendants ceased to occupy, and paid no rent, though the apartments were repaired, and the defendants were apprised of the fact some months afterwards.

The Court held, first, that the defendants were liable to rent until the tenancy was terminated by their consent; and, secondly, that use and occupation was the proper remedy, though the defendants never occupied, as the power to occupy or enjoy was given by the landlord, so far as depended on him.

DAVIS *v.* MORGAN, E. T. 1825. K. B. 4 *B. & C.* 8.

A party who has the use of water, with the permission of the owner, is liable to an action for use and occupation.

IN an action for use and occupation, it appeared that A., being seised of an ancient mill, together with a stream of water diverted out of a river, and flowing from thence unto her mill; and B. being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of A., by means of a head wear, and flowing from thence through the lands of A. down to B.'s

* And a party receiving the rents under an agreement for a lease is chargeable as occupier. (*Neal* v. *Swind*, E. T. 1832, Ex., 2 C. & J. 377; S. C. 2 Tyrw. 464). But a tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation. (*Edge* v. *Strafford*, E. T. 1831, Ex., 1 C. & J. 391; S. C. 1 Tyrw. 293). And, in an action on an agreement for not accepting a lease, if it appear that there was a person who had an interest in the premises, and it be not proved at the trial that such a person was a party to the lease tendered, the plaintiff cannot recover; neither under such circumstances is he entitled to recover for use and occupation, though the defendant may have received rent from the under-tenants. (*Rumball* v. *Wright*, M. T. 1824, N. P., 1 C. & P. 589). So, a party who actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises. This nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises:—Held, that he was not liable to rent for the period between the time of the occurrence of the nuisance, and that at which he quitted the premises. (*Cowie* v. *Goodwin*, H. T. 1840, N. P., 9 C. & P. 378). And if rent be payable half-yearly, and the tenant quits, and the landlord re-lets before the next half-year, use and occupation does not lie. (*Hall* v. *Burgess*, E. T. 1826, K. B., 5 B. & C. 332; S. C. 8 D. & R. 67). So, in an action for use and occupation of a lodging, under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution:—Held, that the plaintiff could not recover the weekly rent, which accrued after he was fully informed that the defendant occupied the lodgings for the purposes of prostitution. (*Jennings* v. *Throgmorton*, E. T. 1825, N. P., 1 Ry. & M. 251).

In the absence of any privity of contract, the legal owners of the estate should sue for rent for use and occupation. (*Morgell* v. *Paul*, E. T. 1828, K.B., 2 M. & R. 303).

mills as appurtenant to the same; B. erected upon lands below the lands of A., and near the said watercourse, two other mills, whereby, it becoming necessary for him (B.) to have a larger supply of water, he widened and deepened his watercourse in the soil of A., raised and heightened the head wear, and thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of A. so copiously as it had formerly done, and thereby A.'s mill became of no use. A. having recovered damages in one action against B. on this account, and having afterwards brought a second action for subsequent damages, in order to prevent all further disputes, B. agreed to take a grant from A. of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting the water out of the river. By lease reciting these facts, A., in consideration of 1500*l.*, paid by B., demised to B. the use of the watercourse so widened and deepened as aforesaid, and the free liberty of diverting so much of the water of the river into and along the watercourse as should be necessary for the use of B.'s mills, habendum for the use of ninety-nine years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed, A.'s mill was destroyed. B., or those claiming under him, continued to enjoy the watercourse, and the use of the watercourse, and the use of the water during the term, and paid the rent. The lease having determined by the death of the last surviving cestui que vie, the person claimed under the grantee to enjoy the watercourse in the manner described in the grant, and paid rent for it. The reversion in the lands upon which A.'s mill formerly stood, having vested in C.—

The Court held, that the latter might maintain indebitatus assumpsit for the use and occupation of the watercourse, and the water running therein, against the persons who claimed under B.

II. RELATIVE TO BY AND AGAINST WHOM AN ACTION FOR USE AND OCCUPATION CAN OR CANNOT BE MAINTAINED.

EVANS *v.* EVANS, E. T. 1834. K. B. 3 *Ad. & E.* 132.

Mere agents as such are not liable for use and occupation*.

UPON a letting by auction, although there was nothing to shew that the defendant, the lessee, was to hold of the plaintiff, the owner, and an express condition that the rent was to be paid to the auctioneers, or their order, but the owner signed the conditions, as approving of them.

* So, a landlord demised certain premises by indenture at a specific rent, and afterwards the lessee agreed that if the lessor would enlarge the buildings on the premises demised, he would pay a sum of 10*l.* per cent. additional on the outlay. The additional erections were made, and the lessee subsequently became bankrupt:—Held, that this agreement was a collateral contract made by the bankrupt, from which he was discharged by the certificate, and not one running with the land for which the assignees, who retained the use of the premises, were liable. (*Lambert* v. *Norris*, H. T. 1837, Ex., 2 M. & W. 333). A tenant having become insolvent, his assignees paid one quarter's rent, on being allowed to remove certain fixtures. It was not proved that they had occupied the premises

The Court held, that the auctioneers were to be considered only as agents, and that an action of debt for the use and occupation could not be maintained against them.

III. RELATIVE TO THE FORM OF ACTION.

MORTIMER *v.* PREEDY, E. T. 1838. Ex. 3 *M. & W.* 602.

Debt will not lie by the assignee of a reversion for rent due before the assignment.

DEBT for rent for use and occupation, on a parol demise by the assignee of the reversion—

The Court held the action not maintainable, as to the rent accruing for the occupation before the assignment. The proper remedy would have been for debt for rent on a parol demise.

IV. RELATIVE TO THE DECLARATION.

BIRD *v.* HIGGINSON, H. T. 1835. K. B. 4 *N. & M.* 505.

The declaration must state actual occupation.

DECLARATION for use and occupation stated a special agreement to take a certain messuage &c., with the right of exclusive shooting over a manor, to hold for a certain time; it then alleged, that the defendant entered and became "possessed" of the premises for the term granted.

The Court held, that the plaintiff could not recover as for use and occupation under this count. It should have averred an actual occupation.

V. RELATIVE TO THE PLEAS.

NICHOLL *v.* WILLIAMS, T. T. 1837. Ex. 2 *M. & W.* 758.

If the defendant proves his plea of payment, which only goes to part, the plaintiff is entitled to a verdict for nominal damages.*

IN an action for use and occupation, the declaration stated that the defendant was indebted in 105*l.* for use and occupation. The particulars were for 52*l.* 10*s.*, being the balance of one year's rent, at 105*l.* (the admitted rent) per annum. The defendant pleaded, to all but 52*l.* 10*s.*, non assumpsit, and as to 52*l.* 10*s.*, the residue, payment. The plaintiff joined issue on the plea of non assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, the defendant did not use the particulars to restrain the plaintiff's proof.

The Court held, that, taking this circumstance, together with the

—Held, that the landlord could not recover the sum so agreed to be paid in assumpsit on an account stated. (*Clarke* v. *Webb*, T. T. 1834, Ex., 4 Tyrw. 673; S. C. 1 C., M. & R. 29).

* In an action for use and occupation, payment of money into Court by the defendant admits the contract; and, therefore, it is not open to him to contend that the plaintiff is without title, or that another, as plaintiff, should have joined in the action, although these facts may appear doubtful on the plaintiff's own evidence. (*Dolby* v. *Iles*, H. T. 1840, Q. B., 3 P. & D. 287).

Nil habuit in tenementis is not a good plea to a declaration in debt for use and occupation. (*Curtis* v. *Spitty*, T. T. 1834, C. P., 4 M. & Scott, 554; S. C.

particulars and pleadings, the plea of payment referred to the sum admitted in the particulars, and not to the balance claimed, and that the plaintiff was entitled to nominal damages.

VI. RELATIVE TO THE EVIDENCE*.

VII. RELATIVE TO THE WITNESSES†.

1 Bing. N. S. 15). So, in an action for use and occupation, a plea, stating a demise of certain premises at a fixed rent, payable quarterly, and alleging, as to one quarter's rent, an eviction from the premises during the quarter, and before the rent became due, is bad, as amounting to the general issue. (*Prentice* v. *Elliott*, M. T. 1839, Ex., 7 D. P. C. 819; S. C. 5 M. & W. 606).

* In an action for use and occupation, it is not a ground for nonsuit that the plaintiff does not produce a written agreement, under which the premises are held, if the evidence given by the plaintiff in support of his case does not disclose the existence of such an agreement. (*Fry* v. *Chapman*, M. T. 1836, B. C., 5 D. P. C. 265). Where a tenant, by a written agreement, has agreed to take premises from a future day, it is not enough, in an action for use and occupation, to put in the agreement; but evidence must be also given of some occupation under it. (*Woolley* v. *Watling*, H. T. 1837, N. P., 7 C. & P. 610).

Under the plea of non assumpsit, in an action for use and occupation, the defendant may give in evidence a notice from a mortgagee to pay the rent to him, and thereby discharge himself from rent which becomes due subsequent to such notice; but payment to the mortgagee of rent due before the notice must be specially pleaded. (*Waddilove* v. *Barnett*, M. T. 1835, C. P., 4 D. P. C. 347; S. C. 2 Bing. N. S. 538; S. C. 1 Scott, 763).

The putting up a board for the purpose of letting houses, by a person who built them, and agreed to become tenant of them from a certain time, is sufficient to enable the persons for whom they were erected to recover rent on a count for use and occupation. (*Sullivan* v. *Jones*, H. T. 1829, N. P., 3 C. & P. 579). If, in an action for use and occupation, the defendant cannot shew, by the cross-examination of the plaintiff's witnesses, that the premises are held under a written agreement, but it afterwards appeared, by the evidence of the defendant's witnesses, that the premises are so held, the plaintiff is not bound to put in the written agreement. (*Marston* v. *Dean*, T. T. 1835, N. P., 7 C. & P. 13).

In an action for use and occupation, the only evidence that the plaintiff was landlord of the premises was, that he went to the defendant, who was the tenant, and said that he had bought the premises, whereupon the tenant wished him joy of the purchase, and that on the plaintiff sending to demand rent, the tenant refused to pay because he had had notice to quit and an action had been brought against him, but said he would give up the premises to the plaintiff at the expiration of the notice:—Held, that this was evidence to go to the jury; but the Judge intimated that it would be dangerous to act on such slight evidence, and that, if the plaintiff had the legal title to the property, he ought to shew that. (*Stephens* v. *Lynn*, E. T. 1838, N. P., 8 C. & P. 389). In an action for use and occupation, since the new Rules, it cannot be left to the jury to say whether the evidence produced by the defendant does not amount to an admission by the plaintiff that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties. (*Linley* v. *Polden*, E. T. 1835, Ex., 3 D. P. C. 780).

† In an action by A. against B. for use and occupation, C., who was called as a witness for the plaintiff, stated that A. had let the premises to him, and that his (C.'s) tenancy was still undetermined. It was proposed, on the part of the plaintiff, to ask C. whether he had not let the defendant into possession:—Held, that this could not be asked unless he was released by A., and that the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27, did not apply in this case. (*Hodson* v. *Marshall*, T. T. 1835, N. P., 7 C. & P. 16).

Usury*.

I. RELATIVE TO WHAT AMOUNTS TO.

(*a*) BEFORE THE 3 & 4 WILL. 4, c. 98; 1 VICT. c. 80; 2 & 3 VICT. c. 37; AND 4 VICT. c. 54, p. 553.

(*b*) SINCE THE 3 & 4 WILL. 4, c. 98; 1 VICT. c. 80; 2 & 3 VICT. c. 37; AND 4 VICT. c. 54, p. 553.

II. RELATIVE TO A LIEN IN CASE OF, p. 553.

III. RELATIVE TO SUBSTITUTED SECURITIES, p. 553.

IV. RELATIVE TO THE DECLARATION FOR PENALTIES, p. 554.

V. RELATIVE TO THE PLEA, p. 554.

* By 3 & 4 Will. 4, c. 98, bills or notes not having more than three months to run were not subject to the usury laws; and the 1 Vict. c. 80, extends that period to twelve months. And the 2 & 3 Vict. c. 37, after reciting that, by 1 Vict. c. 80, it was enacted, 'that bills of exchange payable at or within twelve months should not be liable, for a limited time, to the laws for the prevention of usury; and that the duration of the said act was limited to the 1st of January, 1840; and it is expedient that the provisions of the said act should be extended.' It is enacted—

1. "That from and after the passing of this act no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of 10*l.* sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, nor the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate drawing, accepting, indorsing, or signing any such bill or note, or tendering or advancing, or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein."

2. "Provided, that nothing in this act contained shall be construed to enable any person or persons to claim, in any court of law or equity, more than 5 per cent. interest on any account, or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the Court that any different rate of interest was agreed to between the parties."

3. "Provided, that nothing herein contained shall extend, or be construed to extend, to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect to all intents and purposes whatsoever, as if this act had not been passed."

4. "That this act shall continue in force until the 1st of January, 1842;" continued by 4 Vict. c. 54, and 6 & 7 Vict. c. 45.

I. RELATIVE TO WHAT AMOUNTS TO.

(*a*) Before 3 & 4 Will. 4, c. 98, 7 Will. 4 & 1 Vict. c. 80, 2 & 3 Vict. c. 37, and 4 Vict. c. 54.

Stoveld *v.* Eade, H. T. 1827. C. P. 4 *Bing.* 81.

A person requested bankers in the country to give him a bill drawn by them on their London bankers, in exchange for another bill of the same date and value, which they did, deducting 4 per cent. for interest and commission.

The mere exchange of acceptances was not a loan*.

The Court held this not to be usurious, not being a loan.

(*b*) Since 3 & 4 Will. 4, c. 98, 7 Will. 4 & 1 Vict. c. 80, 2 & 3 Vict. c. 37, and 4 Vict. c. 54†.

II. RELATIVE TO A LIEN IN CASE OF.

Hargreaves *v.* Hutchinson, M. T. 1834. K. B. 4 *N. & M.* 11; S. C. 2 *Ad. & E.* 12.

The plaintiff obtained money from the defendant upon a contemplated sale of malt, and immediately resold to him at an advanced price, payable in bills, the defendant retaining the malt as a security. The jury having found the transaction merely colourable and usurious—

Under an usurious contract a party can have no lien.

The Court held, that the plaintiff was entitled to recover in trover, although the bills remained unpaid, as no lien could exist.

III. RELATIVE TO SUBSTITUTED SECURITIES‡.

* So, a mere arrangement for payment, and not a loan, is not usury. (*Harvey* v. *Archbold*, H. T. 1825, K. B., 3 B. & C. 626; S. C. 5 D. & R. 500; S. C. 1 Ry. & M. 184). An annuity of 120*l.* was granted for four lives in consideration of 1000*l.*, the grantor covenanting to insure that sum within thirty days after the falling in of the third life:—Held, not usurious. (*In re Naish*, M. T. 1830, C. P., 7 Bing. 150).

Where, upon a transfer of 12,000*l.* Three per Cents, as a loan, (being at 63½), it was agreed that the borrower should secure the payment of 10,000*l.* sterling whenever they reached 83½, with liberty to retain the amount for two years and a half after such event, and that five per cent, as on a loan of 10,000*l.*, should be paid:—Held, that, as there was a chance of benefit in the stock advancing beyond 83½ during the two years and a half, it was to be taken as an equivalent for the excess of the interest, and the transaction not usurious. (*Farquharson* v. *Barstow*, 4 Bligh, 560).

Upon payment the usury is complete. (*Wood* v. *Grimwood*, E. T. 1830, K. B., 10 B. & C. 689).

† The stats. 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4 & 1 Vict. c. 80, contemplate only the case of interest taken upon or secured by a bill of exchange or promissory note as the real bonâ fide ground of the debt, and do not extend to the case of a bill of exchange or promissory note, given in addition to a security of another nature, not protected by the statute. (*Berrington* v. *Collis*, H. T. 1839, C. P., 5 Bing. N. S. 332). Under 3 & 4 Will. 4, c. 98, a warrant of attorney may be given to secure the bill. (*Connop* v. *Yeates*, M. T. 1834, K. B., 4 N. & M. 302; S. C. 2 Ad. & E. 326).

‡ Where a second bill was given to raise money to pay a former bill, which was

IV. RELATIVE TO THE DECLARATION FOR PENALTIES.

PEARSON *v.* M'GOWRAN, H. T. 1825. K. B. *3 B. & C.* 700; S. C. *5 D. & R.* 616.

The action must be brought in the county where the offence was completed*.

DECLARATION in debt for penalties under the statute of Queen Anne, for usury; venue in Middlesex.

The Court held:—The venue in an action on 12 Ann. c. 16, for usury, must be laid in the county in which the money is paid, and not in the county in which the contract is made.

V. RELATIVE TO THE PLEA†.

Variance. See tits. *Amendment—Arrest—Bail—Declaration,* and particular heads according to the subject-matter.

Vendor and Purchaser.

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tainted with usury, but not in substitution of it:—Held, that its validity was affected thereby. (*Marchant* v. *Dodyin*, M. T. 1832, C. P., 2 M. & Scott, 637).

* In debt for penalties the exact day must be stated. (*Fox* v. *Keeling*, H. T. 1835, K. B., 4 N. & M. 523). If no day is laid, it will be bad. If a wrong day is laid, it will be a fatal variance. (*Partridge* v. *Coates*, M. T. 1824, N. P., 1 Ry. & M. 153; S. C., 1 C. & P. 534).

† Where an action of debt was brought for arrears of an annuity of 20*l.* per annum, granted to the plaintiff for the term of sixty years, in consideration of 200*l.*: upon demurrer to the declaration, it was held, that the Court would not of themselves pronounce that contract usurious, but that the defendant ought to have pleaded that it was a usurious contract. (*Ferguson* v. *Sprang*, T. T. 1834, K. B., 3 N. & M. 665).

In an action by the indorsee against the acceptor of a bill of exchange, payable three months after date, given for a debt due on an account stated, usury cannot be pleaded since the stats. 3 & 4 Will. 4, c. 98, and 7 Will. 4 & 1 Vict. c. 80. (*King* v. *Braddon*, T. T. 1839, Q. B., 2 P. & D. 546).

VI. RELATIVE TO THE RIGHTS OF ASSIGNEES OF BANKRUPT, p. 560.

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(*a*) Parties to, p. 561.
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I. RELATIVE TO THE VENDOR, AND OF HIS TITLE.

Curtis *v.* Blow, E. T. 1831. K. B. 2 *B. & Ad.* 426.

It is the duty of the vendor to ascertain that no prior charge exists*.

A testator gave a certain sum in long annuities, after payment of his debts and certain other expenses which he charged upon the fund. After his death, an amicable suit in Chancery was instituted by the legatee against the executor, who admitted assets; and thereupon a decree was made, directing the transfer of the fund into the name of the accountant-general, in trust in the cause, subject to the further order of the Court; but no reference had been made to the Master to take an account of the debts.

Held, 1st, that the legatee could not make out a good title to the fund until it reasonably appeared that there was no outstanding claim for debts; and, 2ndly, that it was the duty of the vendor on making a sale to ascertain that no prior charge exists.

II. RELATIVE TO THE VENDEE.

(*a*) Who may be†.

* A vendee who sells prematurely cannot recover damages on such sale for defect of title. (*Walker* v. *Moore*, M. T. 1829, K. B., 10 B. & C. 416).

In the absence of a stipulation as to producing lessor's title on the sale of a lease, the vendee is entitled to have it established. (*Souter* v. *Drake*, H. T. 1834, K. B., 3 N. & M. 40). A condition that vendor shall not be obliged to produce lessor's title, does not preclude vendee from raising objections afterwards from other sources. (*Shepherd* v. *Keatley*, T. T. 1834, Ex., 1 C., M. & R. 117; S. C. 4 Tyrw. 571).

Where A., having a life interest in the dividends of funded property, and also in certain leaseholds, joined with her children, entitled in reversion to the principal, in assigning the property to the defendant, to hold, receive, and convert the same into money, and for that purpose to sell the leasehold and reversionary interest in the funds, with a proviso that it should not affect the life interest of A. in the funds during the period of five years:—Held, that the defendant at the expiration of that period was entitled to sell absolutely. (*Boyman* v. *Gutch*, H. T. 1831, C. P., 7 Bing. 379; S. C. 5 M. & P. 222).

† In an action against the purchaser for not paying the remainder of the purchase-money, pursuant to an agreement, on the vendor executing a bond for

(*b*) Rights of.

1. *In general.*

Curling *v.* Shuttleworth, H. T. 1830. C. P. 6 *Bing.* 121; S. C. 3 *M. & P.* 368.

Where it is a matter of doubt whether a purchase may not become matter of investigation the vendee is not bound to complete*.

By a deed, dated in 1812, the mortgagor assigned to the mortgagee his interest in a policy of insurance. In the year 1813 the mortgagee, having advanced a further sum of money, the mortgagor executed a deed, reserving a power of sale in case the mortgage money remained unpaid on a certain day. In 1822 a further sum was advanced, and a new deed entered into, converting the arrears of interest into principal. This latter deed omitted the power contained in the second deed. The mortgagee advertised the policy for sale, "under a power." It was purchased by the plaintiff; but the mortgagor having refused to concur in the conveyance—

The Court held, that the plaintiff was entitled to recover back his deposit, as he was not bound to complete a purchase which might involve him in litigation.

Smith *v.* Ferrand, T. T. 1827. K. B. 7 *B. & C.* 19.

Electing to take a bill instead of cash is a payment by the vendee.

The vendor of goods received from the vendee an order from his banker for the price of the goods, and the latter, with whom money had been deposited to meet that and other demands, offered to pay in cash, deducting the discount for the period of credit, or by bill upon a third party, which the seller elected to take.

The Court held, that, although the bill was afterwards dishonoured he could not sue the purchaser for the price of the goods.

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2. *To Rescind the Contract.*

Dykes *v.* Blake, E. T. 1838. C. P. 4 *Bing. N. S.* 463.

The purchaser may annul the

The particulars of a sale by auction described lot 13 as first-rate building ground, subject to the same rights of way and passage,

completion of a good title:—Held, that it was no answer at law that the plaintiff had purchased the estate, being the property of a bankrupt, whose assignee he was; and where the defendant knew from the first the difficulties attending the completion of the title:—Held, that time was not of the essence of the contract. (*Willett* v. *Clarke*, M. T. 1821, Ex., 10 Price, 207).

* A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—Held, that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. (*Lord Camoys* v. *Scurr*, T. T. 1840, N. P., 9 C. & P. 383).

A. commissioned her brother to buy a cow for her, and a fortnight afterwards he bought a cow; but before the cow had either come to the plaintiff's hands, or she had assented to the purchase, the cow was taken by the defendant:—Held, that A. had such property in the cow as would enable her to maintain trespass. (*Thomas* v. *Philips*, 1836, N. P., 7 C. & P. 573).

A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title-deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title-deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor of the original vendor in whose custody they were. (*Jarmain* v. *Egelstone*, M. T. 1831, N. P., 5 C. & P. 172).

and other rights and easements over the same, as are now enjoyed under the existing leases of certain other houses. The description of lot 12 stated that the purchasers of the lot would be entitled to a right of carriage and foot-way, thirteen feet wide, over lot 13, on the northern boundary thereof, as shewn upon the plan; and it also contained certain reservations similar to those in lot 7, which were set out in the description of that lot, and were said to be shewn on the plan. It was also stated where the lease of lot 7 was to be found, and it was said that it would be produced at the sale. The particulars of the other lots stated the reservation as in lot 7, and as shewn in the plan. The plaintiff became the purchaser by a single contract of lots 12 and 13, and upon finding that the inhabitants of the other houses mentioned had a right of way not delineated upon the plan, with the privilege, amongst others, of carrying dung, compost, &c. to their gardens, the vendee abandoned the contract altogether, and required the return of his deposit, &c.

entire contract for a partial misdescription.

The Court held, that the misdescription vitiated the sale of lot 13, and that it had the same effect as to lot 12, inasmuch as the sale of both was treated as one contract, and to be paid for as such; consequently, that the plaintiff had a right to rescind his contract altogether.

EARLY *v.* GARRET, T. T. 1829. K. B. 9 *B. & C.* 928.

CONTRACT for the sale of a piece of land. The contract was that the seller was not to warrant the title, and the buyer was to take the conveyance with all faults and defects, if any. Before the sale was completed the buyer asked the seller if any rent had ever been

Whether concealment be fraudulent is a question for the jury*.

* If the conditions of sale do not agree with the lease the contract may be resinded. (*Flight* v. *Booth*, M. T. 1834, C. P., 1 Bing. N. S. 370; S. C. 1 Scott, 190). If property be sold at auction under a description which is untrue, and calculated to entrap persons coming into the auction-room, the sale is void, and the purchaser may recover back his deposit in an action for money had and received. (*Robinson* v. *Musgrove*, H. T. 1838, N. P., 8 C. & P. 469). And where, by the terms of the contract, goods were to be delivered on board ship by a certain date, and a bill of lading sent and delivered forthwith, and which the plaintiff delayed, until payment for the goods, which were by the contract to be paid for by draft, and defendant's acceptance guaranteed by a banker, which was refused, and after the lapse of a fortnight from the arrival of the ship, the defendant repudiated the contract altogether:—Held, that he was entitled to do so. (*Barber* v. *Taylor*, M.T. 1839, Ex., 5 M. & W. 527). On the sale of a reversion, expectant on the death of A. B. without children, an error in the statement of A. B.'s age does not come within the condition (as it would if the reversion were simply expectant on A. B.'s death), because it affects the probability of the other contingency, which is not a subject of calculation, and the purchaser is entitled to rescind the contract. (*Sherwood* v. *Robins*, T. T. 1828, N. P., 1 M. & M. 194; S. C. 3 C. & P. 339). But where a party who has been imposed upon, and induced, by false and fraudulent representations, to buy shares in a supposed mining company, after a knowledge of the fraud adopts the contract and treats the shares as his own valid shares, he is estopped from afterwards rescinding the contract; and it is immaterial whether he knew the full extent of the fraud or not. (*Campbell* v. *Fleming*, E. T. 1834, K. B., 1 Ad. & E. 40).

Where any substantial part of the property, purporting to be sold, turns out to have no existence, or cannot anywhere be found; or if the description be so exaggerated as to be quite beyond the truth, and the vendor not acting bonâ fide in giving it:—Held, that the purchaser has a right to rescind the contract, notwithstanding a clause that any mistake in the description shall not vitiate the contract, but be a ground of compensation. (*Robinson* v. *Musgrove*, 1836, N. P., 2 M. & Rob. 113). Where it is provided by the conditions of sale by auction, that "if any mistake be made in the description of the premises, or any other material error

paid. The seller answered that no rent had ever been paid by the person through whom he claimed, or by any one through whom that person claimed. The other believed this to be the truth at the time; but the fact turned out to be otherwise, and the purchaser was afterwards evicted by title paramount. In an action by vendee against vendor—

The Court were of opinion that the question whether the concealment was fraudulent or not was properly left to the jury.

III. RELATIVE TO THE SALE*, WHEN COMPLETE, AND CONSTRUCTION OF THE CONTRACT.

HEAD *v.* DIGGON, M.T. 1828. K. B. 3 *M. & Ry.* 97.

An undertaking, that the vendee is to have "time to consider," is not a binding contract†.

AN offer made by one party to an intended contract, allowing a given time to the other to accept or refuse—

The Court held, it did not bind the person who made the offer until it had been accepted, and he might, therefore, withdraw his offer within the limited time.

HOWES *v.* BALL, M. T. 1827. K. B. 7 *B. & C.* 481; S. C. 1 *M. & Ry.* 288.

A contract to resume posses-

BY an agreement for the purchase by A. of a stage-coach of B., to be paid for by bills, it was stipulated, that, if the same were

shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made;" the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. (*Wright* v. *Wilson*, 1832, N. P., 1 M. & Rob. 207).

Where, on the sale of fixtures and fittings-up of a public-house, a misrepresentation as to the business was made:—Held, to avoid the sale, although by the agreement the good-will was expressly excluded. (*Hutchinson* v. *Morley*, H. T. 1839, C. P., 7 Scott, 341).

* A sale in the city of London, in a building publicly used as a shop, having windows in which the articles commonly sold there are exhibited, is a sale in a market overt by the custom of London, although the shop be not literally open to the street. (*Lyons* v. *De Paas*, H. T. 1840, Q. B., 3 P. & D. 177; S. C. 9 C. & P. 68).

† A., on the 4th of January, agreed to sell to B. a stack of hay for the sum of 145*l.*, to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for:—Held, that this was a contract for an immediate and not a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him. (*Farley* v. *Baxter*, H. T. 1827, K. B., 6 B. & C. 360). But where, after a previous negotiation and trial, the defendant wrote to the plaintiff to say he would purchase his mare at —— guineas, "of course warranted," which not being attended to, he, by a second letter, desired the mare to be sent, with a receipt, including "sound and quiet in harness," on which the plaintiff wrote to say that he would send her, that she was warranted sound and quiet in double harness, never having been tried in single; he accordingly sent it to the place appointed, and left it with injunctions not to be parted with unless the price was paid; but the defendant's son afterwards came, and took her away without payment, and, in the course of two days, she was sent back as unsound:—Held, that there was no evidence of a final contract, nor of a delivery according thereto, so as to entitle the plaintiff to recover. (*Jordan* v. *Norton*, T. T. 1838, Ex., 4 M. & W. 155).

Delivering part, and packing up the residue, with notice, is a delivery. (*Rohde* v. *Thwaites*, H. T. 1827, K. B., 6 B. & C. 388).

not paid, B. "should have and hold a claim upon the coach until the debt be duly paid." The bills were given at different dates, but the first was dishonoured, after which A. died; and the plaintiff, having taken out administration, continued to carry on the business of stage-coach keeper, and sent it for repairs to defendant, who thereupon detained it, on the ground of the bills never having been paid. In trover—

sion in case of non-payment is personal, and on death of vendee does not apply to his administrator.

The Court held, that the original transaction amounted to a sale and transfer of property in the coach, and that the utmost effect of the agreement was to construe it a license to resume possession of and retain the coach in case the bills were not paid by A.; but that such license being merely personal, and not transferable, it could not be available against his administrator, to whom the property came by operation of law, and that the defendant was not therefore justified in detaining it.

IV. RELATIVE TO AGENTS CONNECTED WITH*.

V. RELATIVE TO THE DEPOSIT.

SPRATT *v.* JEFFERY, M. T. 1829. K. B. 10 *B. & C.* 249.

THE owner of leasehold property contracted to sell it "as he then held the same," and the purchaser engaged to buy it "without requiring the lessor's title." He subsequently, at his own expense, examined the lessor's title, and found it to be defective.

If no title is to be furnished, vendee cannot recover his deposit on defect of title †.

The Court held, that, nevertheless, he was not entitled to rescind the contract, and recover back his deposit money.

* An agent cannot delegate his authority so as to bind the vendor or vendee. (*Henderson* v. *Barnewell*, E. T. 1827, Ex., 1 Y. & J. 387).

† If a vendor cannot seek to enforce his contract, the vendee cannot sue for his deposit. (*Clark* v. *Upton*, M. T. 1828, K. B., 3 M. & Ry. 89). In an action by the vendee on an agreement for the purchase of a public-house, with mutual stipulations, and liquidated damages for non performance:—Held, both parties having made default under the agreement, that the plaintiff was entitled to recover his deposit. (*Clarke* v. *King*, E. T. 1826, N. P., 1 Ry. & M. 394). By an agreement of reference pursuant to a Judge's order between G. and H., professing to be an administrator cum testamento annexo of A., all matters were referred to an arbitrator, who directed certain premises to be sold by an auctioneer, (assented to by both parties), and the purchase-money to be applied in a particular manner. G.'s attorney, who knew that administration had not been taken out by H., became the purchaser at the sale, and paid a deposit to the auctioneer, it being understood, at the time of the sale, that H. would take out such letters of administration. This he refused to do:—Held, that the purchaser could recover his deposit from the auctioneer without notice of his rescinding the contract. (*Duncan* v. *Cape*, H. T. 1831, Ex., 2 M. & W. 244). And where A., by agreement made on the 31st of March, agreed to grant to B. a lease of certain premises, habendum from the 29th of September then next for twenty-one years, in consideration of 1000*l.*, of which 10*l.* was paid at the time of the agreement; 90*l.* was to be paid on the 13th of April, and the residue on having possession of the premises; and B., being called upon to pay the 90*l.*, demanded an abstract of A.'s title, which was refused, whereupon he gave notice that he would rescind the contract, and commenced an action to recover the 10*l.* which he had paid:—Held, that he was entitled to recover, it being proved at the trial, that, at the time when the action was commenced, A. had no power to grant the lease contracted for. (*Roper* v. *Coombes*, E. T. 1827, K. B., 6 B. & C. 534). So, where

VI. RELATIVE TO THE RIGHTS OF ASSIGNEES OF BANKRUPT.

Miles *v.* Gorton, H. T. 1834. Ex. 2 *C. & M.* 504; S. C. 4 *Tyrw.* 295.

Upon the bankruptcy of

The defendants sold twenty pockets of hops, which were in their warehouse, and sent an invoice containing the words "at rent" to

certain premises were sold under a contract, by which, in consideration of 200*l.*, paid by way of deposit, and in part of the consideration of 5500*l.* agreed upon for the price at which they were to be sold, and possession was to be given on a certain day. It was stipulated that 1000*l.* should be paid as liquidated damages in case of the non-performance of the contract. On the appointed day, possession not being given up, the purchaser refused to complete his contract, and brought an action for money had and received, to recover his deposit, but failed, as the vendor was not shewn to have refused to complete the sale. The vendor, after the commencement of that action, sold the premises to another:—Held, that the purchaser was then entitled to maintain an action for money had and received to recover his deposit, and that a plea of judgment recovered for the defendant was not sustainable, as, though the deposit was the subject of each action, the cause of action was different. (*Palmer* v. *Temple*, H. T. 1839, K. B., 1 P. & D. 379). And where, in the particulars of sale of certain premises by auction, they were described as comprising a "yard," and to be held for a term of which twenty-three years were unexpired, at 55*l.* per annum. It turned out, that the yard was held under a lease from year to year, at an additional rent of 8*l.* One of the conditions of sale was, that if there was any error or mistake in the description of the property each party should appoint an arbitrator, and that the arbitrators should fix on the sum to be abated from the purchase-money. The jury found that the yard was essential to the occupation of the premises:—Held, that this was not a matter for compensation, but that it was such a defect in title as to entitle the vendee to vacate the contract. (*Dobell* v. *Hutchinson*, T. T. 1835, K. B., 5 N. & M. 251; S. C. 3 Ad. & E. 355). But, in assumpsit to recover back the deposit paid by the plaintiff upon a contract for the purchase of an estate from the defendant, on the ground of his not being able to make a good title, it appeared that he was devisee in remainder after his mother's death, and subject to a small annuity to his sister, in the conditions of sale it was stated that the sister claimed under a deed of assignment of the premises to her in trust, but which deed was alleged to be a forgery; and it was stipulated that the purchaser should not make any objection on account of the alleged indenture, and that part of the purchase-money might remain on mortgage as an indemnity:—Held, that the plaintiff having purchased with notice of the defect, and having precluded himself from objecting at all to the supposed deed, he could not insist upon it as a defect in the title, which he had agreed to take, and was, therefore, not entitled to recover back the deposit on that ground. (*Corrall* v. *Cattell*, H. T. 1839, Ex., 4 M. & W. 734).

In an action to recover the deposit on the purchase of an estate, on the ground of a defect in the vendor's title specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if then stated, have been removed. (*Todd* v. *Hoggart*, M. T. 1827, N. P., 1 M. & M. 128).

In assumpsit by vendee against vendor, to recover back a deposit paid on the purchase of real property, the defendant, at the trial, produced (under a notice to produce) the agreement, which had been signed at the foot of the conditions of sale:—Held, that it was necessary to call the subscribing witness to prove the execution of this agreement. Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, and it appeared, in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate:—Held, that the defendant could not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to shew that, before the sale, the plaintiff had read the original lease under which the property was held. (*Bradshaw* v. *Bennett*, M. T. 1831, N. P., 2 M. & M. 143; S. C. 5 C. & P. 48).

In an action to recover back the deposit paid on a purchase at an auction (for

the purchaser, from whom they received a bill of exchange, which they negotiated. During the currency of the bill, by order of the vendee, they delivered ten pockets to a sub-vendee, who paid the amount charged for warehouse-rent, but, before the bill was due, the vendee became bankrupt, and, at maturity, the bill was dishonoured.

vendee, his assignees are in no better situation than himself.

The Court held, that the assignee of the bankrupt vendee could not maintain trover for the residue of the hops remaining in the defendants' warehouse, without a tender or payment of the price agreed on, and of the warehouse rent, being in no better situation than the bankrupt himself.

VII. RELATIVE TO RE-SALES*.

VIII. RELATIVE TO ACTIONS CONNECTED WITH. See, also, Div. V. *Relative to the Deposit,* ante, p. 559.

(*a*) Parties to.

Seaman *v.* Price, H. T. 1825. C. P. 2 *Bing.* 437; S. C. 1 *R. & M.* 195; S. C. 1 *C. & P.* 586.

In assumpsit, the plaintiff declared that he had bargained with J. S. for the purchase of three houses for a certain sum, and that the defendant agreed to give him 40*l.* for his bargain, if he would permit him to be the purchaser instead of the plaintiff, and averred that he did become such purchaser.

A party, who has agreed to purchase, may sell his interest to another purchaser, and maintain an action against the latter.

The Court held, that the action might be supported, although there was no written contract for the purchase of the houses between the plaintiff and J. S., as the latter allowed the defendant to become the purchaser, and he was, in fact, let into possession of the premises.

Orme *v.* Broughton, E. T. 1834. C. P. 4 *M. & Scott,* 417; S. C. 10 *Bing.* 353.

Defendant agreed with plaintiff's intestate to sell him a freehold estate for a certain sum, part to be paid immediately, and the residue upon a certain day, when the sale was to be completed, and a good abstract of title to be delivered. The purchaser was also to be entitled to the rents and profits, upon certain conditions, from the ensuing Christmas to the day fixed on for the completion of the

The administrator of the vendee, and not the heir at law, must sue for the non-performance of a

defective title), the question for a court of common law is, not whether the vendor's title be such as a court of equity would decline to compel an unwilling purchaser to take, but whether it be a legal title. (*Boyman* v. *Gutch,* H. T. 1831, C. P., 7 Bing. 379; S. C. 5 M. & P. 222).

The purchaser cannot recover interest on his deposit, unless there be a valid contract. (*Gosbell* v. *Archer,* H. T. 1835, K. B., 4 N. & M. 485).

* The vendor of goods may re-sell them if the purchaser refuse to accept them, and if any loss accrue to him on such re-sale he may recover the amount in an action for the breach of contract. (*Maclean* v. *Dunn,* E. T. 1828, C. P., 4 Bing. 722).

contract on the sale of an estate.

contract. The defendant did not fulfil his agreement, and the plaintiff having sued as administratrix of the purchaser, upon demurrer—

The Court held, that the non-performance of the contract by the defendant, and its consequences, the loss upon the deposit, the expenses of investigating the title, the non-enjoyment of the rents for the interval agreed upon, amounted to such an injury to the personal estate of the intestate as vested a right of action in the personal representative, not in the heir-at-law; consequently, that the action was well brought.

(*b*) Declaration.

Wilmot *v.* Wilkinson, E. T. 1827. K. B. 6 *B. & C.* 506.

On a refusal to complete, no conveyance need be tendered.

By an instrument in writing (not under seal), A., in consideration of 7000*l.*, agreed to present to a rectory, on the next avoidance, such person as B. should nominate, and to furnish an abstract, and execute a conveyance of the next presentation to B. A. afterwards, with the assent of B., agreed to sell the next presentation to C., and to convey such title as he (A.) had received in consideration of 7,500*l.*, of which the 500*l.* was to be paid to B. on a certain day. A. furnished an abstract of such title as he had, but C. refused to take it, and no conveyance was tendered to him. In an action by B. against C. for the 500*l.*—

The Court held, that there was a sufficient consideration for C.'s promise to pay it, and that A. was not bound to make a marketable title, but only to make such as he had received, and that, as C. refused to accept that title, it was not necessary to tender a conveyance.

Poole *v.* Hill, T. T. 1840. Ex. 6 *M. & W.* 835; S. C. 9 *D. P. C.* 300.

That the plaintiff was ready and willing to execute a conveyance is sufficient.

On a declaration in covenant by the vendor of lands against the intended purchaser for non-payment of the purchase-money—

The Court held, that it need not aver an offer or tender of the conveyance to the defendant: but it is sufficient to allege that the plaintiff was ready and willing to execute a conveyance.

Ballard *v.* Way, E. T. 1836. Ex. 1 *M. & W.* 520; S. C. 1 *T. & G.* 851.

If the contract be conditional, it must be so stated;

Leasehold premises were sold by auction, described as an eligible investment, well secured, and with a reversionary interest. By the provisions of a public and local act for the building of a market, the premises were liable to be taken for the market at any time. No notice was given of this liability in the particulars of sale, and there was no express warranty of title. The jury found, that, in point of fact, the vendee had no notice of this liability.

Held, first, that the plaintiff was not justified in describing this contract as a warranty of a clear title, free from all charges, incumbrances, and liabilities; it should have stated the condition: but, secondly, that the purchaser was entitled to rescind the contract, when he discovered that the premises were subject to be taken under the Market Act.

SANSOM *v.* RHODES, H. T. 1840. C. P. 6 *Bing. N. S.* 261.

THE defendant was the vendor of certain lots of ground, which were put up to sale by auction on the 18th of September, 1838, under the following, amongst other, conditions: that the purchaser should pay down a deposit of 10*l.* per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 28th of November, 1838; that a proper abstract would be delivered within fourteen days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the said conditions; that the deeds of conveyance and assignment, including any assignment of attendant terms on the freehold, should be prepared, &c., and left at the office of the vendor for execution on or before the 10th of November, 1838; any objection to the title should be communicated within twenty-one days after the delivery of the abstract, and every objection not taken, and so communicated within such period, should be deemed waived and not to be made, and in that respect time was to be considered as of the essence of the contract. The plaintiff became the purchaser; and, in an action against the defendant for a breach of the agreement in not deducing a good title to the premises on or before the 28th of November, on a special demurrer to the declaration—

and that a reasonable time for deducing the title had elapsed.

The Court held, that, as there was no precise time specified for the deducing of a good title, the vendor was allowed by law a reasonable time for so doing; and, as the declaration contained no allegation that a reasonable time for deducing such title had elapsed, it was bad.

METCALFE *v.* FOWLER, M. T. 1849. Ex. 6 *M. & W.* 830.

THE declaration stated, that, by articles of agreement made between the plaintiff and the defendant, the defendant agreed that he would, on or before the 25th of March then next ensuing, convey a certain estate to the plaintiff, and pay the expenses of investigating the title; that the plaintiff agreed that he would, on the 25th of March then next, on having the conveyance made to him, pay the defendant the purchase-money; that the expenses of making out the title should be paid by the defendant; and that, in case the purchase were not completed by the said 25th of March, the plaintiff should pay interest on the purchase-money. The declaration then alleged as a breach, that, although the plaintiff was always, from the time of the agreement until and upon the said 25th of March, ready and willing to accept from the defendant a conveyance of the premises, and to pay the purchase-money, yet the defendant did not nor would, on the day and year last aforesaid, or at any other time whatsoever, make to the plaintiff a good title to the said premises. The purchase was not completed on the 25th of March, but much negotiation took place between the parties between that day and the 12th of January following, when the plaintiff gave the defendant notice of his abandonment of the purchase on the ground of defects of title. Subsequently to the 25th of March, the plaintiff paid the purchase-money into the hands of a banker, and, on the abandonment of the contract, brought an action for the expenses of investigating the title, and for the loss of interest accruing after that day on the sum deposited in the banker's hands.

Where time is of the essence of the contract, the declaration must state a loss subsequent to that time.

The Court held, that, as time was of the essence of the contract,

the plaintiff could not under this declaration recover his expenses of investigating the title, together with the loss of interest accruing subsequently to March 25.

(*c*) Pleas.

Malins *v.* Freeman, E. T. 1838. C. P. 4 *Bing. N. S.* 395.

The plea must not state a mere inference of law*.

In an action against the defendant to recover damages for not paying for an estate purchased at an auction, a plea, alleging that it was a condition of the sale, that a moiety of the excise duty or poundrate granted by the act of Parliament in that case made and provided, should be paid by the purchaser over and above the price bid at such sale; and that such moiety of the said excise duty was not now, nor was any part thereof paid by defendant at the time of the sale, though payment was then demanded, or at any time since, but the same remains wholly due and unpaid on defendant's part; and to pay the same or any portion thereof defendant hath wholly neglected and refused, and still so neglects and refuses, contrary to the statute in such case made and provided, whereby and by force of the said statute the said bidding and sale became, and were, and still are, wholly void,

The Court held the plea to be bad; merely stating in fact an inference of law.

(*d*) Evidence.

Murley *v.* M'Dermott, T. T. 1838. Q. B. 3 *N. & P.* 356.

A handbill exhibited at the

Two contiguous premises were sold by auction to different parties, and the conveyances to the purchasers described them as in the

* The plaintiff declared that the defendant bargained for and bought of the plaintiff a quantity of trees, not less than 5000, nor more than 6000, to be well taken up by the plaintiff at the usual time of the year, and to be delivered to the defendant within a reasonable time; and it was averred that the plaintiff well and properly took up for the defendant 6000 trees, being not less than &c., and offered to deliver them to the defendant, but he refused to accept them. Second plea, that the plaintiff did not well and properly take up for, or offer to deliver to, the defendant, 6000 trees, being &c.:—Held, that this plea was bad for duplicity, but not for putting in issue the delivery of the precise number of 6000 trees. Thirdly, that it was the duty of the plaintiff, according to the usage of trade, and according to the contract, to have abstained from taking up the trees until he received notice from the defendant to do so. Fourthly, that the trees bargained for were trees growing in a certain nursery ground, and that the trees taken up by the plaintiff, and offered by him to be delivered, were not the trees growing in that nursery ground, nor the trees for which the defendant bargained:—Both pleas held to be bad, as amounting to the general issue. (*Smith* v. *Dixon*, M. T. 1837, K. B., 2 N. & P. 1; S. C. 6 D. P. C. 47).

Where a vendor covenants to deduce a good title at A., B, or C., on or before a certain day, a plea, that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title, is insufficient. So, a plea, that, by a subsequent agreement, not under seal, made before breach, the time for deducing such title had been enlarged, and that the defendant was ready to deduce such title within the enlarged time, is bad. So, a plea, that, in consideration that the defendant would deduce a good title and convey (after breach), plaintiff agreed to accept such title and conveyance at a later day, is bad. (*Rippinghall* v. *Lloyd*, M. T. 1833, K. B., 2 N. & M. 410).

occupation of certain tenants, and all that was known and reputed to be in the occupation of those tenants was conveyed. In an action where the issue was as to the parcels conveyed, a hand-bill, circulated at the auction before and at the time of the sale, and seen by the agent of one of the purchasers, in which the extent of the respective properties was described—

time of sale admissible as explaining the description of the premises in the conveyance*.

The Court held, to be properly received in evidence against him, not to control or construe his deed of conveyance, but to explain it.

SHELTON *v.* LIVIUS, E. T. 1832. Ex. 2 *C. & J.* 411.

AT a sale by auction, the plaintiff and defendant bid for a crop of growing wheat, described in the particulars of sale as "ten acres of spring wheat, more or less." The printed particulars also contained a memorandum, that the keep of all the fields would be sold with the crops, and a condition, "that no mistake as to the description of the lot, whether as to quantity or any other error, should vitiate the sale thereof." The lot was knocked down to the plaintiff as the highest bidder, and his name then entered as the purchaser in the auctioneer's book; but, after the sale, the plaintiff and defendant directed the auctioneer to enter the name of the defendant as the buyer at the sum which he had bid for the lot, which the auctioneer did, and received a deposit from the defendant. The wheat turned out not to be "spring wheat," but "red Lammas wheat," sown in the spring. In an action to recover the price of the crop—

Parol evidence not admissible to change the terms of the contract entered in the agent's book.

The Court held, that the plaintiff was bound by the particulars of sale, in the same manner as the original party on whose account the auctioneer had sold, and therefore could not give evidence of a statement made by the auctioneer at the time of the sale, that the keep of the field was not to form part of the lot; and that the misdescription of the crop as spring wheat was not within the condition, but vitiated the contract.

BOLD *v.* RAYNER, E. T. 1836. Ex. 1 *M. & W.* 343.

THE bought and sold notes for the purchase of palm oil differed in these respects:—the former was for "100 tons of oil, at 31*l.* 10*s.*

But parol evidence is ad-

* The assignee of a lease of certain premises, put it up to sale by auction, one condition being that he should prove no title prior to his own. In an action against the defendant for not completing the purchase:—Held, under the circumstances of the case, that the plaintiff was obliged to prove the execution of the lease as well as of the assignment, the declaration stating that he was possessed of such lease, and such allegation being the foundation of the action. (*Laythoarp* v. *Bryant*, H. T. 1835, C. P., 1 Bing. N. S. 421; S. C. 1 Scott, 327).

Where a broker effects a sale between two parties, the bought and sold notes delivered to them, and not the entry in the books, are the proper evidence of the contract. (*Thornton* v. *Meux*, H. T. 1827, N. P., 1 M. & M. 43). Where brokers sold goods by auction, and being under advances to their principal gave an invoice in their own name, and received the price:—Held, that they were concluded by their invoice, and were not at liberty to set up, that they only sold as brokers, and that the buyer knew or had the means of knowing, that they did not sell as principals. (*Jones* v. *Littledale*, E. T. 1837, K. B., 1 N. & P. 677). But, where a party sells goods to A., and makes out an invoice to him, and directs a warehouseman to transfer them to him, which he does, the vendor cannot afterwards set up the title of B. as a joint purchaser with A.; and evidence of B.'s title is not admissible in an action of trover against the vendor, though there be a plea alleging the joint property of A. and B., and issue thereon. (*Kieran* v. *Saunders*, E. T. 1837, K. B., 1 N. & P. 625).

missible of the usage of trade.

per ton, to be taken from the quay at landing weights with customary allowances, to be delivered from the Speedy or Charlotte, expected to arrive about November or December next; and should the said vessels be lost this contract to be void." The latter omitted the mention of the weights and allowances, and was, "ex Speedy and Charlotte to arrive." Evidence of mercantile usage was received to construe the notes, and according to that evidence there was no material variance.

Per Cur.—There are no material variances. The one document is a little more full than the other. If the term, "expected to arrive," could have amounted to a representation, the contract might have been avoided; but that was not its effect. The evidence of the usage was clearly admissible, and established, that, when the different expressions were explained, there was no variance.

(*e*) Question for the jury.

Lang *v.* Smith, H. T. 1831. C. P. 7 *Bing.* 284; S. C. 5 *M. & P.* 78.

It is for the jury to say whether the party acted with due caution in the transfer of shares.

The plaintiff was possessed of certain Neapolitan securities called bordereaux, annexed to which were certain coupons or receipts for consecutive half-yearly payments of interest to accrue thereon. The coupons referred to an accompanying certificate, which declared the securities not to be transferable, but, on the presentation of that certificate according to the course of practice of the English market, the whole of these documents passed together on a sale. The plaintiff (obtaining his certificate) placed the bordereaux in the hands of his broker, for the purpose of procuring new bordereaux with fresh sets of coupons from the Neapolitan government. The broker having obtained them handed them over to the defendant as security for a debt. In an action for their recovery it was left to the jury to say whether these instruments passed by delivery, and whether the defendant had acted with due caution in receiving the bordereaux and coupons without inquiring for his certificate. The jury negativing both these questions—

The Court held, that the plaintiff was entitled to recover.

(*f*) Damages.

Hopkins *v.* Grazebrook, M. T. 1826. K. B. 6 *B. & C.* 31.

A party who sells without a title is liable for damages by reason of the non-completion of the contract and not the mere expenses*.

In an action by vendee against vendor—

The Court held, first, that a contract to sell, implies a promise that the seller has title; and if it turns out that he has not, he is liable in damages to the purchaser, not only to the amount of his expenses actually incurred, but to the value which the bargain would have been of to him if it had been completed; but, secondly, at all events, a person who has not even an equitable interest, but who contracts to sell in the fair expectation that he will be able to do so, is liable to pay the value which the bargain would have been to the intended purchaser.

* Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle, (pending an endeavour by the vendor to clear up the

(*g*) Execution*.

Venire, Award of.

See tit. *Issue*.

Warrington *v.* Lloyd, M. T. 1838. Q. B. 1 *P. & D.* 157.

If there be two pleas to the same count, one traversed the other demurred to, the venire should be to try the former and assess damages on the latter.

In this case a rule nisi had been obtained for setting aside the issue, which had been delivered by the plaintiff, for irregularity.

Per Lord *Denman*, C. J.—The question is, whether it be necessary that the jury process should be as well to try the issues in fact, as to assess damages on the issues in law, in a case where two pleas are pleaded to the same count, to one of which the plaintiff replies, and to the other demurs, so that an issue in fact, and another in law, arise out of the same count. It is said a venire tam quam cannot be necessary, because, if the jury find the issue in fact for the plaintiff, they will, of course, assess damages also, which must obviously be the same as would be assessed on the issue in law; and if they find it for the defendant the action is defeated, and no damages can be recovered. This argument is quite justified in the event of the jury's finding for the plaintiff; but if they should find for the defendant, it is still possible that the plea may be held bad, and that the Court may give judgment for the plaintiff, notwithstanding the verdict. If they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury will have to assess them; whereas if the venire in the first instance be tam quam, they would be assessed by the first. The practice has been to award a venire tam quam in such cases as there seems to be a possible state of circumstances which may lead to

title), may be recovered as damages against the latter in an action for breach of his contract. (*Sherry* v. *Oke*, H. T. 1835, B. C., 3 D. P. C. 349). Where, upon a contract of sale of an estate, the money was to be paid by instalments, with interest, at 5 per cent., and it was afterwards agreed that the last instalment, if not paid at the appointed time, should remain on mortgage at 4½ per cent.:—Held, that the prior instalments not being paid, nor any mortgage executed, that the highest interest continued payable on the last instalment. (*Attwood* v. *Taylor*, T. T. 1840, C. P., 1 Scott N. S. 611; S. C. 1 M. & G. 279).

Upon failure on the part of the vendor to make out a title, the purchaser is entitled to recover the expense of comparing deeds, searching for judgments, and journies for that purpose, and interest on his deposit, but not of expenses incurred previously to the contract, nor of a surveyor of the estate, nor of a conveyance prepared in anticipation of the purchase being completed, nor the extra costs of the suit for specific performance in which the vendor fails, nor loss on the sale of stock for the purchase-money. (*Hodges* v. *Earl of Litchfield*, H.T. 1835, C. P., 1 Bing. N. S. 492; S. C. 1 Scott, 443).

Upon a sale of goods by sample, at a specific price:—Held, that the plaintiff could not recover more than the actual value, the goods not corresponding in quality with the sample. (*Germaine* v. *Burton*, 1820, N. P., 3 Stark. 32).

* A. agreed with B. to make D. a gig for a given price. The body of the gig and wheels were selected by B., and A. promised to deliver it in a few days. The full price was paid. Before it was finished, it was seized by the sheriff under a fi. fa. issued against A. The gig was afterwards finished, and delivered to B., with the assent of the judgment creditor. The sheriff afterwards took it to secure his poundage:—Held, that he had no right to do so, and that B. might maintain trover for the gig. (*Goode* v. *Langley*, T. T. 1827, K. B., 7 B. & C. 26).

summoning a second jury if that form be not adopted. This issue, therefore, is incorrect in not adopting it, and the rule for setting it aside as irregular must be made absolute.

Venue.

I. RELATIVE TO, IN GENERAL.

(*a*) When local or transitory, p. 568.

(*b*) Changing of.

1. *Grounds for, and of the Terms imposed,* p. 568.
2. *At what Time Application should be made,* p. 570.
3. *Of the Undertaking to give Material Evidence,* p. 570.
4. *In Case of New Trial,* p. 570.
5. *Costs on,* p. 571.

(*b*) Bringing back or retaining, p. 571.

II. RELATIVE TO, IN PARTICULAR. See particular titles according to the form of action and subject-matter.

I. RELATIVE TO, IN GENERAL*.

(*a*) When local or transitory. See particular titles according to the form of action and subject-matter.

(*b*) Changing of†.

1. *Grounds for, and of the Terms imposed.*

Scruton *v.* Dawson, M. T. 1831. C. P. 8 *Bing.* 28; S. C. 6 *M. & P.* 92.

To change the venue some ground should be shewn.

It was moved on the usual affidavit to change the venue from London to the city of Norwich, unless the plaintiff would consent to try at the next assizes for Norfolk; but

* By Reg. Gen., H. T. Will. 4, the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading: provided that, in cases where local description is now required, such local description shall be given.

† By Reg. Gen., H. T. 2 Will. 4, in cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid.

The Court held, that the defendant must shew some special ground.—Rule refused.

ALCOCK *v.* COOK, T. T. 1830. C. P. 6 *Bing.* 733.

ON motion to change the venue—

The Court refused to allow the venue to be changed on the mere ground that many witnesses resided in the county to which it was proposed to change it, if there be also many witnesses on the other side residing at the place where the venue is laid.

Several witnesses residing in the county is no ground.

AMNER *v.* CATTELL, M. T. 1828. C. P. 5 *Bing.* 208; S. C. 2 *M. & P.* 367.

THE defendant obtained a rule nisi to change the venue from London to Warwick on the usual affidavit. Cause was shewn on an affidavit which stated that the defendant's attorney had declared that he should change the venue to postpone the trial till the assizes, when Lord Tenterden's Act, (9 Geo. 4, c. 14), would have come into operation, and thereby defeat the plaintiff's claim, as he had no promise in writing.

The Lord Chief Justice and Mr. Justice *Park* were of opinion that the rule should be discharged. Mr. Justice *Borough* and Mr. Justice *Gaselee* thought that the defendant's attorney should have an opportunity of answering the affidavit; but as he did not do so effectually, the rule was ultimately discharged.

So, the venue cannot be changed for the purpose of delay, in order that an act of Parliament may come into operation*.

PICARD *v.* FEATHERSTONE, M. T. 1826. C. P. 4 *Bing.* 39.

AN application to change the venue was opposed on an affidavit which stated that it was an action of assumpsit on a written contract, and the case of *Morris* v. *Harry* (7 Taunt. 306) was relied on, where the Court would not allow the venue to be changed in an action upon any written instrument; and in *Whitburn* v. *Staines*, (2 B. & P. 355), they refused to change it in an action of assumpsit on an award, although the declaration contained the common counts. So, in *Weatherby* v. *Young*, (2 B. & C. 552), the Court of King's Bench would not, before issue joined, entertain a motion to change the venue in an action on a specialty.

Per Cur.—The case of *Morris* v. *Harry*, as reported in Moore, lays down the rule, viz. that the Court will not change the venue if it appears on the face of the declaration that the contract on which the action is brought is in writing or by deed. In *Whitburne* v. *Staines*, the first count of the declaration was upon an award; and in the case of *Pinkney* v. *Collins*, (1 T. R. 571), which

The venue cannot be changed in an action on a written contract†.

* There being no more than twenty-nine special jurors within the county:—Held, not a sufficient ground for changing the venue. (*Doe* d. *Lloyd* v. *Williams*, H. T. 1839, C. P., 5 Bing. N. S. 205).

† Cannot be changed in an action on an award. (*Stanway* v. *Heslop*, K. B., 3 B. & C. 9; S. C. 4 D. & R. 635).

But, although a promissory note is not made payable to order, the Court

was there referred to, the Court refused to change the venue in an action on a bill of exchange, on the ground that such instruments were bona notabilia in any county. We concur in these decisions.

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2. *At what Time Application should be made.*

RUSSELL *v.* HART, M. T. 1832. Ex. 1 *C. & M.* 184; S. C. 3 *Tyrw.* 218.

An order to plead issuably does not prevent the defendant from changing the venue*.

THE Master having refused to draw up the rule to change the venue in this case, from Yorkshire to Lancashire, on the ground that the defendant had obtained an order for time to plead, "pleading issuably"—

Lord *Lyndhurst*, C. B.—I see no objection to the defendant changing the venue when he is merely under terms to plead issuably, though the practice is different in this Court when he is to plead issuably on the "usual terms."—Rule granted.

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3. *Of the Undertaking to give material Evidence*†. See, also, ante, p. 568.

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4. *In Case of new Trial* ‡.

will grant a rule to change the venue on the common affidavit. (*Smith* v. *Elkins*, T. T. 1832, K. B., 1 D. P. C. 426).

Where the place of trial is convenient to defendant in one county and the plaintiff in another, the latter has the right of election. (*Jenkins* v. *Hutton*, E.T. 1823, C. P., 7 Moore, 520).

* But the defendant cannot change the venue after an order for time to plead, "on the usual terms," either in town or country causes, whether the trial will be delayed or not. (*Notts* v. *Curtis*, H. T. 1832, Ex., 2 C. & J. 345; S. C. 2 Tyrw. 307). So, the venue cannot be changed after plea in abatement. The rule is confined to pleas in bar. (*Wigley* v. *Dubbins*, M. T. 1826, C. P., 4 Bing. 18). But where the justice of the case clearly requires it, it is a discretion to be exercised with caution. (*Bailey* v. *Beaumont*, M. T. 1823, C. P., 11 Moore, 385). Where, after the cause on a bill of exchange had stood over at the county assizes for want of special jurors, the defendant became a prisoner, the Court allowed the venue to be changed and taken at a sittings in term, on terms of the defendant paying the difference of expense of trial. (*Keys* v. *Smith*, T. T. 1834, C. P., 10 Bing. 1).

The Court refused to discharge a rule for changing the venue from London to Glamorganshire, obtained upon the usual affidavit, although it was sworn that the cause of action arose partly in that county and partly in Ireland. (*Fisher* v. *Waring*, T. T. 1838, C. P., 6 Scott, 377).

† An undertaking to give material evidence in the county in which the venue is changed, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post-office in that county at the time the goods were forwarded. (*Linley* v. *Bates*, T. T. 1832, Ex., 2 C. & J. 659). So, proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place. (*Gosling* v. *Birnie*, T. T. 1830, N. P., 1 M. & M. 531).

‡ Application refused to change the venue to London, upon a rule for a new trial, on the ground that all the witnesses on the former trial came from London on the first trial, and that the parties lived there. (*Palmer* v. *Marshall*, M. T. 1831, C. P., 8 Bing. 155; S. C. 1 M. & P. 252).

5. *Costs on.*

PUGH v. KERR, T. T. 1840. Ex. 8 *D. P. C.* 218; S. C. 6 *M. & W.* 17.

The costs of an abandoned rule to change the venue not costs in the cause.

THE venue having been laid in Middlesex, the defendant applied to have it changed, and on the 30th of January the rule was made absolute, "on payment of the costs of the application, and of all costs reasonably and bonâ fide incurred, and rendered useless by that rule." The sittings commenced on the 1st of February. The defendant drew up the rule, and served it on the plaintiff, with a notice of taxation for that day. The plaintiff then withdrew the record, and sent his witnesses (who were on their way to London) back to Wales. The costs were taxed under the rule on the 8th of February, and on the 11th the defendant gave notice that he abandoned the rule.

The Court (dissentiente *Maule*, B.) held, that, inasmuch as the rule was conditional only, the defendant had a right to abandon it; and, the cause having been subsequently tried at the Middlesex sittings, and a verdict found for the plaintiff, that the costs so taxed under the rule were not costs in the cause.

(*b*) BRINGING BACK OR RETAINING*.

Verdict.

See, also, particular titles according to subject-matter.

HENLY *v.* MAYOR, &c. OF LYME REGIS, T. T. 1829. C. P. 6 *Bing.* 100; S. C. 3 *M. & P.* 278.

A verdict wrongly entered will be amended†.

A VERDICT having been taken at the trial (by consent) on two counts of the declaration, both containing in substance the same cause of action—

* The Court refused to bring back the venue on an affidavit merely shewing that the cause of action arose in two other counties than that in which it was originally laid, and not going on to undertake to give material evidence there. (*Whitehouse* v. *Hudden*, E. T. 1823, Ex., 10 Price, 171).

An affidavit, that the cause of action arose in Lincolnshire, and not elsewhere, having been answered by an affidavit that it arose on a contract for the purchase of 500 bags of cotton, to be shipped at Trieste and delivered at Liverpool, the Court refused to change the venue from London to Liverpool. (*Wilkinson* v. *Tattersal*, H. T. 1826, C. P., 3 Bing. 429).

† Where, in trover, the jury found for the plaintiff, but accompanied their verdict with a statement in writing, that, whether the goods were delivered to the defendant as a loan or gift, they ought to have been returned, which the associate refused to receive:—Held, that he was right, it amounting to a mere expression of their private opinion. (*Whittell* v. *Bradford*, T. T. 1839, C. P., 5 Scott, 711).

Where damages found by the jury have been calculated upon a value assented

The Court allowed the plaintiff to amend the postea, by entering up judgment on the first count only, though the Judge who tried the cause declined to interfere.

HALL *v.* ROUSE, T. T. 1838. Ex. 6 *D. P. C.* 656; S. C. 4 *M. & W.* 24.

Whilst a former verdict remains the plaintiff cannot go to trial again.

A CAUSE was referred, and a verdict entered for the plaintiff, subject to the award of an arbitrator, who might alter the verdict. The order of reference not having been delivered to him until the time for making his award had expired, the reference was not proceeded in. The plaintiff subsequently obtained an order for examining a witness upon interrogatories, when the defendant's attorney attended and cross-examined. The plaintiff afterwards gave notice of trial of the same cause, which was tried as an undefended cause.

The Court held, that it was an irregularity to go to trial again while the former verdict remained, and that the irregularity was not waived by the attendance and cross-examination of the witnesses.

EMPSON *v.* GRIFFIN, M. T. 1839. Q. B. 3 *P. & D.* 160.

If a general verdict be entered on some counts good, and others bad, a venire de novo will be awarded.

THIS was an action of slander. The verdict had been given for the plaintiff at the assizes. There were several counts in the declaration; some of them were good, and some bad. The damages were taken generally, without reference to any particular count. There was an application to arrest the judgment; and after that was made by the defendant, there was another made by the plaintiff to the late Mr. Justice *Park*, before whom the cause had been tried, to confine the verdict to the first count, which was good. That application was granted by the learned Judge.

Per Cur.—We are of opinion, that the order for confining the verdict to the first count was erroneously made, for there was evidence given on the fifth count which was distinctly bad; and as the verdict was general, and the damages assessed generally, we cannot tell how much the jury relied on the evidence given on the fifth count in assessing these damages; as, therefore, the fifth count was bad, the verdict must now be taken to have been entered on the whole record. In the Court of Exchequer, under similar circumstances, it was held, that a venire de novo must issue, (*Leach* v. *Thomas*, 2 M. & W. 427). So, in error from this Court, in *Day* v. *Robinson*, (1 Ad. & E. 554). Consequently, the rule in the present instance must follow the principle laid down in those cases.—Order set aside, and venire de novo awarded.

to by counsel on both sides, the Court will not interfere to alter the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation. (*Hilton* v. *Fowler*, M. T. 1836, Ex., 5 D. P. C. 312).

Though a verdict is recorded, yet, if it appear promptly that it is not according to the intention of the jury, it may be vacated and set right. (*Rex* v. *Parkins*, 1824, 1 Moody, C. C. 45).

Vestry*.

I. RELATIVE TO THE APPOINTMENT OF VESTRYMEN, OF THE RIGHTS OF, AND OF SELECT VESTRIES, p. 574.

II. RELATIVE TO THE CONSTRUCTION OF THE 1 & 2 Will. 4, AND OF CUSTOMS CONNECTED WITH, p. 575.

III. RELATIVE TO THE ACCOUNTS, p. 576.

IV. RELATIVE TO THE LIABILITY OF VESTRYMEN, p. 576.

V. RELATIVE TO THE OFFICERS CONNECTED WITH, p. 576.

VI. RELATIVE TO THE INSPECTION OF THE BOOKS, &c., p. 576.

VII. RELATIVE TO MANDAMUS CONNECTED WITH, p. 577.

* By 1 & 2 Will. 4, c. 60,—

Sect. 1. Act may be adopted by any parish.

Sect. 2. Manner of adopting it in parishes where inhabitants do not assemble n open vestry. Form of requisition.

Sect. 3. Upon receipt of requisition, churchwarden to give notice of time and place for receiving votes. Form of notice.

Sect. 4. Form of declaration.

Sect. 5. Churchwardens to declare whether the votes are in favour of adopting this act.

Sect. 6. Rate-payers may inspect votes.

Sect. 7. No person to vote unless he has been rated one year.

Sect. 8. Notice of adoption of the act.

Sect. 9. No similar requisition to be made within three years.

Sect. 10. This act to take effect in all parishes in which its adoption has been notified.

Sect. 11. Penalties on churchwardens and others, and churchwardens refusing to call meetings, &c.

Sect. 12. Notices of election to be given.

Sect. 13. Rate-collectors, &c. may be summoned to assist at the election.

Sect. 14. Form of proceeding at annual elections.

Sect. 15. A ballot may be demanded.

Sect. 16. Mode of voting.

Sect. 17. Duty of inspectors.

Sect. 18. In case of equality of votes.

Sect. 19. Penalty for forging or falsifying any voting list, or obstructing the election.

Sect. 20. Public notice to be given of vestrymen and auditors chosen by parishioners.

Sect. 21. Penalty on inspector for making incorrect return.

Sect. 22. Elections to be annual.

Sect. 23. Vestry to consist of not less than twelve, nor more than 120, householders.

Sect. 24. Proportion of existing vestry to go out of office at each of their first elections under this act.

Sect. 25. Vestrymen to quit office after three years, and one-third of the whole number to be elected annually.

Sect. 26. Qualifications of vestrymen.

Sect. 27. Vestries appointed after the adoption of this act to exercise the authority

I. RELATIVE TO THE APPOINTMENT OF VESTRYMEN, OF THE RIGHTS OF, AND OF SELECT VESTRIES.

REX *v.* JUSTICES OF KENT, M. T. 1834. K. B. 4 *N. & M.* 299.

Under the 59 Geo. 3, c. 12, the justices cannot interfere with the appointment of the vestrymen.

ON a rule calling on certain justices of the peace, for the town and hundred of Tenterden, to shew cause why a mandamus should not issue, commanding them to insert the names of Virgil Pomfret and Thomas Blackmore in the appointment of the select vestry of the parish of Tenterden—

The Court held, that the justices have no discretionary power as to the appointment of persons nominated and elected by the parishioners, as members of the select vestry, under 59 Geo. 3, c. 12, s. 1, but are bound to appoint those whose names are returned to them; even though a person returned may hold an office, the duties of which may be inconsistent with the duties of a select vestryman, as if he be a magistrate acting within the district in which the parish lies.

BLACKET *v.* BLIZARD, T. T. 1829. K. B. 9 *B. & C.* 851.

Where a vestry consists of a certain number, the majority must be present*.

A SELECT vestry of twenty-six was appointed under the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 30, for the care and management of a district church, and a number, less than a majority, met and made a church-rate.

of former vestries. Not to affect local acts regarding vestries, divine worship, &c., except as herein expressed.

Sect. 28. The acts of a quorum of the vestry at any meeting to be considered as the acts of the vestry.

Sect. 29. Meetings not to be held in the church.

Sect. 30. Meeting to elect a chairman.

Sect. 31. Proceedings to be entered in books, to be open to inspection.

Sect. 32. Account-books to be kept, and be open to inspection.

Sect. 33. Auditors to be chosen annually. Qualification. Further qualifications of auditors. Disqualification.

Sect. 34. Mode of audit.

Sect. 35. Auditors may call for persons and books.

Sect. 36. Accounts to be signed by auditors.

Sect. 37. Accounts after audit to be open to inspection.

Sect. 38. Abstracts of accounts to be published fourteen days after being audited.

Sect. 39. Vestry to make out and publish yearly a list of estates, charities, and bequests, &c., with the application thereof.

Sect. 40. Saving of ecclesiastical jurisdiction.

Sect. 41. Meaning of terms used in this act.

Sect. 42. As to affixing notices.

Sect. 43. Act not to extend to parishes where not more than 800 rate-payers, except in cities or towns.

Sect. 44. Public act.

By the 1 Vict. c. 45,—

Sect. 1. So much of the 38 Geo. 3, c. 59, as directs publication of notices, repealed. Notices not to be given in churches during Divine service, &c.

Sect. 2. Notices heretofore usually given during or after Divine service, &c., to be affixed to the church doors.

Sect. 3. Notices for holding vestries to be signed as herein directed.

Sect. 4. Decrees, &c. of Ecclesiastical Courts not to be read in churches.

Sect. 5. Act not to extend to notices purely ecclesiastical.

Sect. 6. Extension of act.

* Where, upon a show of hands, a poll was demanded, and refused by the presiding officer, the Court refused a mandamus. (*Rex* v. *Churchwardens of St. Saviours*, E. T. 1834, K. B., 1 Ad. & E. 380).

The Court held, that the rate was bad, as a majority of the vestrymen ought to have been present.

COCKBURN *v.* HARVEY, E. T. 1831. K. B. 2 *B. & Ad.* 797.

Where no select vestry, the commissioners have authority under the 59 Geo. 3 to enforce a rate for repairs of the church*.

A DISTRICT church was erected under the 58 Geo. 3, c. 45, in a place having no select vestry, and, consequently, under the 59 Geo. 3, c. 134, s. 30, the commissioners had the care and management of the concerns of the church.

The Court held, that, it being doubtful, and by no means of necessary or clear implication, that the Legislature intended by the statute to give to such select vestry the power of making church-rates, upon the principle that acts by which charges may be brought upon the subject, or he may be deprived of his rights, in derogation of the common law, are to be construed strictly, the select vestry appointed under the latter act could not impose a rate for the repairs of such district church, but that the commissioners might do so.

II. RELATIVE TO THE CONSTRUCTION OF THE 1 & 2 WILL. 4 †, AND OF CUSTOMS CONNECTED WITH.

GOLDING *v.* FENN, H. T. 1828. K.B. 7 *B. & C.* 765; S. C. 1 *M. & Ry.* 647.

Vestry may be regulated by custom, and is valid if not inconsistent with law.

ON prohibition—

The Court held, that it is no objection to a custom for a select vestry that the numbers who are to compose the vestry are indefinite, although new members are to be elected by the present members, and not by the parish at large; but the number must be reasonable, and the question of reasonableness of number must, in such a case, be decided with reference to the population of the parish, and the previously established usage.

* The consent of a select vestry for the care and management of the concerns of the poor, constituted and established according to the provisions of the stat. 59 Geo. 3, c. 12, is sufficient to render valid a contract under the stat. 9 Geo. 1, c. 7, s. 4, for the lodging, keeping, and maintaining the poor of a parish. (*Clarke* v. *King*, M. T. 1828, Ex., 2 Y. & J. 525). Where, by a local act, it was enacted, that "the inhabitants paying to the rates should meet on Tuesday in Easter week, to elect to vacancies among the guardians of the poor, and that the major part of the inhabitants should make a list of eight persons, four of whom were to be appointed by the justices:"—Held, that this was not a parish within the exception of 58 Geo. 3, c. 69, s. 8. To come within that clause, the local act must be such as creates a peculiar constitution and powers, which would not be possessed under the general act. (*Rex* v. *Churchwardens of Clerkenwell*, E. T. 1834, K. B., 1 Ad. & E. 317; S. C. 3 N. & M. 411).

† The qualification required to entitle a person to be on the vestry, under the 26th clause of 1 & 2 Will. 4, is, that he should be a resident householder rated or assessed at a rental of 40*l.* per annum; and it is not required that he should be the occupier of all the premises for which he is so rated. By the 59 Geo. 3, c. 39, (a local act), an oath was prescribed, to the effect that he would execute the several powers reposed in him as a vestryman, appointed in pursuance of that act:—Held, that, after the parish had adopted the act 1 & 2 Will. 4, c. 60, that oath was absurd, and that a vestryman was not required to take it. (*Rex* v. *Churchwardens of St. Pancras*, E. T. 1834, K. B., 1 Ad. & E. 80; S. C. 3 N. & M. 425).

III. RELATIVE TO THE ACCOUNTS*.

IV. RELATIVE TO THE LIABILITY OF VESTRYMEN.

LAMBERT *v.* KNOTT, T. T. 1825. K. B. 6 *D. & R.* 122.

Where nine are to constitute a vestry, but four only gave the order, they are personally liable†.

A LOCAL act placed the management of the parish under nine persons, as governors and guardians, but authorized the churchwardens and overseers, with the governors and guardians, or any five or more of them, to enter into contracts; and the plaintiff, at a vestry, tendered a contract, nominally, as with the "governors and guardians," which was accepted and signed, and the defendants, who were the four overseers, all concurred, and gave the necessary orders from time to time.

The Court held, that they were personally liable, and that they could not object that the plaintiff had not joined the whole of the governors and guardians.

V. RELATIVE TO THE OFFICERS CONNECTED WITH.

M'GAHEY *v.* ALSTON, M. T. 1836. Ex. 2 *M. & W.* 206.

Acting as vestry clerk is primâ facie evidence of appointment‡.

IN an action brought by a vestry clerk on behalf of the parish, under a local act, where there was a plea denying his due appointment to the office—

The Court held, 1st, that evidence of his acting as such was sufficient primâ facie evidence of the appointment; and, 2ndly, that one of the vestrymen was a competent witness for him.

VI. RELATIVE TO THE INSPECTION OF THE BOOKS, &c.

REX *v.* ST. MARYLEBONE VESTRYMEN, &c., T. T. 1836. K. B. 6 *N. & M.* 600.

The rate-payers have no right to take extracts from the vestry

THE parish of St. Marylebone having adopted the provisions of the 1 & 2 Will. 4, c. 60, the vestry, on the 4th of July, 1835, resolved that no person should copy from the rate-books; and that,

* Where the accounts of trustees, under a local act, were directed to be audited, and allowed at the sessions:—Held, nevertheless, that they were compellible to produce them before the auditors of the parish accounts, under the 1 & 2 Will. 4, c. 60, s. 34, (Vestry Act), but that a mandamus issued against them, ordering more than was warranted, either by the grievance recited, or by the provisions of the Vestry Act, was bad. (*Rex* v. *Trustees of St. Pancras*, M. T. 1836, K. B., 1 N. & P. 507).

† The vestrymen who put the vestry clerk in motion to defend a local indictment are not liable. (*Sprott* v. *Powell*, E. T. 1826, C. P., 3 Bing. 478).

‡ Under the St. Pancras Vestry Act, the subordinate officers elected by the vestry are not annual officers, and the bonds given for the due execution of their offices to the directors (who are annual officers) continue in force after the latter are out of office. (*M'Gahey* v. *Aston*, E. T. 1836, Ex., 1 M. & W. 386).

agreeably to the 32nd section of that act, no person should be allowed to inspect the books of the parish, except a rate-payer or creditor of the parish. Mr. C. Hibble, a rate-payer, applied subsequently to the vestry-clerk at the Court-house, for permission to inspect and take copies of, or extracts from, the rate-books of the parish. He was allowed to inspect the books, but not to take copies or extracts. On a former day a rule nisi for a mandamus had been obtained, directed to the defendants, commanding them to permit Mr. H. to inspect and take copies or extracts from the rate-books, and all other books mentioned, referred to, and declared to be open at all seasonable times by the 1 & 2 Will. 4, c. 60. Affidavits were filed in answer, from which it appeared that the rate-books did not contain a correct account of the parish expenditure, but that there was a book kept by the direction of the vestry at the Court-house, in which the parish accounts were correctly entered, which was at all seasonable times open to the inspection of the vestrymen, rate-payers, or creditors, who might take copies of, or extracts from, it; and that neither the applicant nor any vestryman, rate-payer, or creditor of the parish had applied or had been disallowed to inspect this book. The rate-books for the current year were in the hands of the collectors.

books, &c., under 1 & 2 Will. 4, unless authorized by the local statute.

The Court held, that they had no authority under the local act, or the 1 & 2 Will. 4, c. 60, which has been adopted by the parish, or at common law, to order the vestry to allow rate-payers to make copies of or extracts from the books, &c., not being authorized by the statutes.

VII. RELATIVE TO MANDAMUS CONNECTED WITH*.

Rex *v.* St. Bartholomew, E. T. 1831. K. B. 2 *B. & Ad.* 507.

This came before the Court upon the return to a mandamus which had been issued, calling upon the churchwardens and overseers of the poor of St. Bartholomew the Great, in the city of London, to give public notice of a vestry of such of the inhabitants of the said parish as were by law entitled to attend vestry meetings, and of the place and hour of holding the same, for the purpose, if they should think fit, of establishing a select vestry for the concerns

To a mandamus, a select vestry cannot return, they have performed the duties immemorially, so as to prevent

* On the nomination of the eight inspectors to act in the election of vestrymen under stat. 1 & 2 Will. 4, c. 60, the decision of the chairman, on a show of hands, that one or the other party has a majority, is not conclusive; but he is bound, on requisition from either side, to take steps for ascertaining the numbers. The mere existence of a party feeling in the chairman is not sufficient ground for impeaching a nomination of inspectors under the statute; but if, after improperly refusing to ascertain the numbers voting, he has declared certain persons to be the inspectors nominated by the meeting, and the election of vestrymen has thereupon taken place, the Court will grant a mandamus for a new election, although a considerable time has elapsed; ex. gr. where the election took place May 6th, and a mandamus was moved for on June 6th, and cause was shewn November 4th, the rule was made absolute November 21st. If four inspectors have been improperly declared to be nominated by the meeting, a mandamus will be granted, although the other four inspectors were duly nominated by the churchwardens, and officiated at the election. (*Reg.* v. *Vestrymen, &c., of St. Pancras*, M. T. 1839, Q. B., 11 Ad. & E. 15).

the operation of the 59 Geo. 3, c. 12*.

of the poor of the said parish, and of nominating and electing the members thereof, if it should appear to the vestry so summoned that such select vestry ought to be established in pursuance of the statutes in that case made and provided; or that cause should be shewn to the contrary. It was stated, in the return by the churchwardens and overseers, that the parish in question was an ancient parish, and that from time immemorial there was and had been an ancient and laudable custom, that the rector and the two churchwardens for the time being, and such parishioners as should have served the office of upper churchwarden, and such other parishioners as should have been elected by the suffrage of the greater number of the rector and parishioners, being members of the vestry, in vestry parochially assembled, were used and accustomed to be members of the said vestry, and, exclusively of the other parishioners, to meet in the vestry, and there to consult, treat, and deliberate among themselves of the parochial matters and other things concerning the said church and parish, or the advantage and benefit of the said parish, and to act as a select vestry for the concerns of the poor of the same. It was also stated in the return, that the rector and churchwardens who made the return, and certain parishioners therein named, at the time when the writ was received were members of and constituted, and at the date of the return were still members of and constituted, the vestry of the said parish, according to the custom; some of the last-mentioned parishioners having previously served the office of upper churchwarden, and the residue having, before they became members of such vestry, been duly elected by the greater number of the rector and parishioners, members of vestry, in vestry parochially assembled; and that the duties imposed on select vestries by the act passed 59 Geo. 3, (c. 12), to amend the laws for the relief of the poor, had immemorially been used, and accustomed to be and still were performed and executed by the vestry so constituted.

Per Cur.—By the statute of 59 Geo. 3, the inhabitants of a parish have a right to establish a select vestry according to the provisions there made, except in certain specified cases; one of which is, where there is already in the parish a select vestry established and acted upon by virtue of ancient usage or custom, and which vestry would be disturbed in its functions by the establishment of a new one. But, supposing such a vestry to exist, with a control over the poor, it ought, in order to exclude the operation of the act, to have already as extensive powers for the regulation of the poor as the statute gives to new select vestries; and the present return states that the ancient vestry has immemorially performed all the duties imposed by the statute. We agree that this is to be taken conclu-

* Where, under a local act, it was provided that there should always be fifty-one trustees, besides those who might become such by virtue of the office of vicar, churchwarden, and overseer:—Held, that a party who was a trustee did not lose the character of trustee by becoming an official trustee, or by being appointed churchwarden; and a mandamus to elect another trustee in his place refused. (*Rex* v. *Trustees of St. Mary Abbott, Kennington*, T. T. 1831, K. B., 2 B. & Ad. 740).

The justices have no jurisdiction as to the vestrymen nominated and elected by the inhabitants in vestry, and therefore have no discretion to refuse the parties so elected; and a mandamus to compel the insertion of names presented was granted. (*Rex* v. *Adams*, M. T. 1834, K. B., 2 Ad. & E. 409).

sively as true in point of fact, if it can be true in point of law. Then the question is, looking at this statement, and comparing it with the statute, whether it can by possibility be true. Among the duties imposed by the statute is that of superintending the funds raised by poor-rates; and it is enacted that the overseers, in the execution of their office, shall conform to the directions of the select vestry, which is substantially a provision that the vestry shall make orders to be binding on the overseers. Now, we know judicially that there were neither overseers nor poor-rates before the 43rd of Elizabeth. The ancient vestry may have had, from time immemorial, the power of applying and managing funds raised for the relief of the poor, otherwise than by compulsory rates, and there is no reason that they should not continue to enjoy that authority, if existing; but it is also clear that the inhabitants are not precluded from exercising the power of appointing a vestry to discharge those functions, and very important ones they are, which arise out of the poor law first established by the statute of Elizabeth. The return cannot be supported, as it in effect merely alleges a usage to prevent the operation of the 59 Geo. 3.

View*.

Voluntary Conveyance†.

* By Reg. Gen., H. T. 2 Will. 4, the rule for a view may in all cases be drawn up by the officers of the Court, on the application of the party, without affidavit or motion for that purpose.

† By 6 Geo. 4, c. 16, s. 73, it is enacted, "That, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him."

By 1 & 2 Vict. c. 110, s. 59, it is enacted, "That, if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons, in trust for, or to or for the use, benefit, or advantage, of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner, appointed under this act: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this act."

The want of possession, under a deed conveying personal chattels, is only evidence of fraud capable of explanation. (*Martindale* v. *Booth*, E. T. 1832, K. B.,

Wager.

I. RELATIVE TO WHEN OR WHEN NOT LEGAL, p. 580.

II. RELATIVE TO THE STAKEHOLDER, p. 582.

III. RELATIVE TO ACTIONS FOR THE RECOVERY OF.

(*a*) Pleas, p. 582.

(*b*) Replication, p. 582.

(*c*) Of the judge refusing to try, p. 583.

3 B. & Ad. 498). A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession, is valid, unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud. (*Eastwood* v. *Brown*, M. T. 1825, N. P., 1 Ry. & M. 312).

One C., who had agreed to purchase certain land of one H., contracted to convey the same to one W., who transferred his interest in the contract to Medley. Medley, in 1818, by settlement made on his marriage, covenanted that, in case C. should be enabled to convey, he would pay C. 150*l.*, and procure the land to be conveyed to the trustees, with a proviso that, if C. should not be enabled to convey, then no obligation or liability at law or in equity should attach on Medley, to procure, or endeavour to procure, a conveyance from any other person, or to pay the value of the same to the trustees by way of satisfaction for the same, nor should Medley in such case be precluded or disabled from purchasing the same for his own benefit. After the marriage had taken effect, viz. in June, 1818, Medley obtained a conveyance of the land from the trustees of H., the owner; and in February, 1818, by settlement, reciting the agreement to purchase, that C. had not been enabled to convey, that Medley had purchased of the owners, and that he was desirous to convey the land to the uses of his marriage settlement, conveyed the same to the trustees of such settlement accordingly:—Held, that Medley being under no obligation, either in law or equity, to transfer the land in question, which he had, in consequence of the inability of C. to convey it, purchased of the trustees of H., without the intervention of C., such settlement, being made after marriage, was purely voluntary, and void as against a bonâ fide purchaser for a valuable consideration. (*Doe* d. *Barnes* v. *Rowe*, T. T. 1838, C. P., 4 Bing. N. S. 737; S. C. 6 Scott, 525).

The assignees of an insolvent debtor are entitled to avail themselves, as "parties grieved," of the provisions of the stat. 13 Elizabeth, c. 5, where a conveyance has been fraudulently made by the insolvent within the prohibited terms of that statute. (*Butcher* v. *Harrison*, T. T. 1833, K. B., 4 B. & Ad. 129). But where, several executions being in at the same time on the insolvent's goods, which, with the landlord's claim, and for taxes, &c., would more than have absorbed the whole property, the insolvent consented to a proposal to assign over the whole of his property to the defendants, one the landlady, and the other one of the execution creditors, for the benefit of all his creditors, the defendants to pay off the execution creditors and carry on the business to a certain time, whereby a surplus would be realised:—Held, that the assignment was not to be deemed voluntary and fraudulent within the Insolvent Acts, and that there was a sufficient consideration from the defendants. (*Knight* v. *Fergusson*, T. T. 1839, Ex., 5 M. & W. 389). So, where the insolvent, being distrained on for rent, applied to the defendants, to whom he was already greatly indebted, for assistance, and they refused, unless he would execute an assignment of his effects to them as a security for the original debt and new advance, which he did:—Held, that it could not be considered a voluntary conveyance within 7 Geo. 4, c. 57, s. 32. (*Amell* v. *Bean*, M. T. 1831, C. P., 8 Bing. 87; S. C. 6 M. & P. 151).

I. RELATIVE TO WHEN OR WHEN NOT LEGAL.

THORNTON *v.* THACKERY, H. T. 1828. Ex. 2 *Y. & J.* 156.

A wager, speculating on the credit of another, is not illegal*.

DECLARATION on an agreement, that, on plaintiff paying 7,500*l.*, defendant should pay to the plaintiff the sum of 10,000*l.*, or such proportion of that sum as J. H. & Co. should pay to their legal general creditors. Averment, that J. H. & Co. had paid their legal general creditors. On error—

The Court held, that it was no ground for arresting the judgment, that the subject-matter was in fact a wager, and speculating on the credit of another, in which the parties had no interest: it rests with the Judge at the trial whether he will proceed with the case.

EVANS *v.* JONES, E. T. 1839. Ex. 5 *M. & W.* 77.

But a wager as to the result of a trial of A. B. upon a criminal charge, pending the trial, is illegal.

ASSUMPSIT. The declaration stated that one T. W. had been brought in custody from Carnarvon to London, where he was indicted for having feloniously uttered a certain forged will, and was, at the time of making the promises thereinafter mentioned, upon his trial at the Central Criminal Court, whereupon, on the 10th of April, 1838, a certain discourse arose between the plaintiff and the defendant with reference to the said T. W. and the said charge against him; whereupon, in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to pay him 1*s.* if the said T. W. should not ever return to Carnarvon, but be transported, &c., the defendant promised the plaintiff to pay him 10*l.* if the said T. W. should not be transported and should return to Carnarvon. Averment, that the said T. W. was duly acquitted of the charge against him, and was not then or at any other time transported, &c., but, on the 1st of May, 1838, returned to Carnarvon. Request to pay and refusal. General demurrer.

Per Cur.—On the principle of the cases that have been decided since *Jones* v. *Randall*, (Cowp. 37), the Court is compelled to say that this wager is void. No one has a right to acquire by his own act an interest in interrupting the course of the administration of justice, especially that of *criminal* justice; but, on the contrary, every one is bound to keep himself and others free to disclose what they may know with regard to the subject of inquiry. It is here stated that the subject of the wager was on *his* trial at the time it was made, and that it is impossible to say in what manner these parties might in fact conduct themselves, yet the *tendency* of the wager was to lead them to procure, by any means, the particular result in which each was interested. That this tendency is the foundation of

* If, to qualify a horse to start for a certain stake, it should have been regularly hunted with the hounds of A. B., it is not necessary that the horse should have hunted *every day* the hounds went out, but *once hunting* with those hounds *is not sufficient*. If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions without the consent of the whole of the subscribers. If the plaintiff's horse was disqualified, as not coming within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was guilty of a misrepresentation. (*Weller* v. *Dawkins*, 1827, N. P., 2 C. & P. 618).

the illegality of such agreements is well established. The principle was much discussed in *Gilbert* v. *Sykes*, (Cowp. 729), where a wager on the life of Napoleon Bonaparte was held to be illegal; and it gave as much satisfaction at the time to hear it so decided, on the ground, that an agreement which had a tendency to encourage assassination could not be supported, though the person to whom it related was a public enemy of the country. The present case is not so strong as that, but our judgment must be for the defendant.

II. RELATIVE TO THE STAKEHOLDER*.

III. RELATIVE TO ACTIONS FOR THE RECOVERY OF.

(*a*) Pleas. See, also, tit. *Bills and Notes.*

Martin *v.* Smith, E. T. 1838. C. P. 4 *Bing. N. S.* 436.

That the action was brought for money on an illegal wager must be pleaded.

In assumpsit for money had and received, plea, non assumpsit. It appeared that a wager of 1000*l.* was made on the result of a trotting match between two celebrated horses, in which wager the plaintiff and the defendant each took shares, and were on the winning side. The defendant promised to pay the plaintiff his proportion as soon as he received it from the owner of the losing horse, but having failed to do so, the action was brought to recover the amount so received. It was objected that the plaintiff must be nonsuited, on the ground that the wager was illegal; but the learned Judge being of opinion that illegality of consideration ought to have been specially pleaded, a verdict was found for the plaintiff.

And of that opinion were the Court.

(*b*) Replication.

Lacey *v.* Umbers, E. T. 1835. Ex. 2 *C., M. & R.* 112.

The replication may traverse the hour of the tender.

The declaration stated, that, by the established usage of racing, it was regulated, that, in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, and be paid into the hands of the person appointed by the stewards to receive the same, and in default thereof by any person he should pay the whole stake as a loser, whether his horse should come in first or not. It then alleged that certain races were appointed to be run at Ludlow; and that, by a regulation of the Ludlow races, all stakes should be paid to the clerk of the races *before eleven o'clock on the day of running*, or the owner should not

* Money deposited with a stakeholder to abide the result of a legal horse-race is not recoverable back from him after the race has been run, although there is a dispute as to the winner. (*Marryat* v. *Broderick*, E. T. 1837, Ex., 2 M. & W. 369).

be entitled, though a winner; that the plaintiff and defendant both ran their horses at those races, the plaintiff having paid his stakes before the hour of starting and before eleven o'clock; that the defendant's horse came in first, and would have received the whole stakes but for his default in not paying *before the hour of starting or before eleven o'clock;* that the plaintiff's horse came in second, and therefore he was entitled to the whole stakes, and the defendant was liable to pay to him the stake which he ought to have paid to the clerk of the races. Plea, that defendant tendered his stakes to the clerk of the races before the hour of *starting* for the first race of the day, and before the running for the second race, but it was refused. Replication, that it was not tendered *before eleven o'clock.* On demurrer—

The Court held, that, even if there were no departure, which, semble, there was, yet the Ludlow regulation did not make the defendant liable to pay as a loser, but only prevented him from receiving as a winner, and that the replication was sufficient, and traversed a material allegation.

(*c*) Of the judge refusing to try.

Walpole *v.* Saunders, M. T. 1825. K. B. 7 *D. & R.* 130; S. C. Robinson *v.* Mearns, H. T. 1825, K. B., 6 *D. & R.* 26.

The Judge at the assizes tried a cause, in which the question was as to which party the stakes of a cricket-match ought to have been paid. It was suggested that it was beneath the dignity of a court of justice to try such a cause—

It is discretionary with the Judge whether he will try the cause*.

The Court said, that it was in the discretion of a Judge whether he would try it; and if he thought proper to do so, they could not set aside the verdict.

Wager of Law†.

Wages. See tits. *Master and Servant—Ship and Shipping.*

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* The Lord Chief Justice will not try an action for money had and received to recover back a deposit paid to abide the event of a wrestling match, which did not take place. (*Kennedy* v. *Gad*, T. T. 1828, N. P., 1 M. & M. 225; S. C. 3 C. & P. 376). And, where an action for money had and received was brought against the stakeholder on a dog-fight to recover the stakes, on the ground that the plaintiff's dog won, the Judge ordered it to be struck out of the cause paper, as he would not try which dog won the battle. (*Egerton* v. *Furzman*, H. T. 1825, N. P., 1 Ry. & M. 213; S. C. 1 C. & P. 613).

† By 3 & 4 Will. 4, c. 42, s. 13, it is enacted, that no wager of law shall be hereafter allowed. (See *Barry* v. *Johnson*, 1 New Rep. 295; *King* v. *Williams*, 2 B. & C. 538; S. C. 4 D. & R. 3).

Wales*.

See, also, tit. *Attorney.*

WILLIAMS *v.* WILLIAMS, M. T. 1831. Ex. 2 *C. & J.* 55.

A judgment signed on a

ON a rule calling upon the plaintiff to shew cause why the judgment signed in the Court of Great Sessions for the county of Carnar-

* By 11 Geo. 4 & 1 Will. 4, c. 70—

Sect. 1. Puisne Judges to sit in rotation, or as they shall agree, but not less than three at a time in banco.

Sect. 2. Salaries to additional Judges.

Sect. 3. Retirement allowances to additional judges.

Sect. 4. Additional Judges may sit in London and Westminster.

Sect. 5. Repeal of act, 3 Geo. 4, c. 102.

Sect. 6. Terms altered.

Sect. 7. Limiting the time for sittings.

Sect. 8. Regulation as to writs of error.

Sect. 9. Judgments to be pronounced in all trials for felonies upon record during the sittings or assizes, except as herein is excepted.

Sect. 10. Attornies of King's Bench or Common Pleas may practise in the Exchequer in like manner. Fees of clerks.

Sect. 11. Judges may make rules for regulation of Courts.

Sect. 12. Justification of bail before Judge in chambers.

Sect. 13. Jurisdiction of Courts at Westminster extended to counties palatine, &c.

Sect. 14. Present jurisdiction of counties palatine and principality of Wales to cease. Suits to be transferred.

Sect. 15. Not to affect the rights of the corporation of Chester.

Sect. 16. Attornies of Courts of Great Sessions allowed to practise on payment of certain fees.

Sect. 17. Attornies of Great Sessions may be admitted as attornies at Westminster.

Sect. 18. Masters Extraordinary, acting in courts abolished by this act, allowed to exercise same powers upon certain conditions.

Sect. 19. Assizes to be held in Chester and Wales.

Sect. 20. Mode of holding assizes in Chester and Wales until his Majesty shall otherwise direct.

Sect. 21. Regulations as to rendering in discharge of bail, defendant not being in custody.

Sect. 22. As to rendering in discharge of bail, defendant being already in custody.

Sect. 23. Upon termination of office of Welsh Judges, their salaries to be retained, and form part of Consolidated Fund.

Sect. 24. Compensation to Welsh Judges on abolition of their offices.

Sect. 25. Compensation to persons affected by abolition of the Courts of Wales and Chester.

Sect. 26. Persons appointed under certain restrictions to the offices about to be abolished not entitled to compensation, and certain statements, to be verified on oath, to be first made by persons claiming compensation.

Sect. 27. Records of the several Courts abolished to be kept as heretofore until otherwise provided for.

Sect. 28. Proclamations upon fines acknowledged before the commencement of this act, how to be made.

Sect. 29. Fines and recoveries to be levied of lands in Cheshire, Chester, and Wales to be levied as in other counties of England.

Sect. 30. Not to affect the rights of assignees by patents before the passing of this act.

Sect. 31. Lord Chancellor may appoint trustees for charitable uses in lieu of Judges abolished by this act.

Sect. 32. Officers to take the same oaths before Judges hereby appointed as they did before the Judges of the Courts hereby abolished.

von, and the execution issued thereon, should not be set aside for irregularity, &c., it appeared, from the affidavits, that the cognovit upon which the judgment and execution were founded had been given in the year 1823, but that the judgment was not entered up until the 10th of October, 1830, the day before the expiration of the Welsh jurisdiction. It was also sworn that the cognovit had been given on a concessit solvere before any process had issued, except what is called a new rule; but it was stated in the affidavits of two practitioners in the Court of Great Sessions, and of the deputy prothonotary thereof, to have been the uniform practice for many years to take such cognovits, and that all the proceedings had been regular so far as related to the practice of that Court. Previously to the judgment being signed, a queratur, tested seven years subsequent to the date of the cognovit, was entered.

cognovit in the Court of Great Sessions in Wales is good, though no proceedings except the service of a new rule.

Per Cur.—It appears to us that this was a regular judgment. The application fails, as the affidavits on which it is founded do not shew that the proceedings have been contrary to the practice of the Court of Great Sessions, and those filed on the other side lead us to conclude them in conformity with that practice. It has been said that the cognovit was given before the commencement of any action, but we do not see why we are not at liberty to presume all to have been rightly done, and, if so, to presume an original to have issued, though it was not served.—Rule discharged, with costs.

EVANS *dem.*, GRIFFITH *ten.*, M.T. 1832. C.P. 9 *Bing.* 311; S.C. 2 *M. & Scott*, 32.

UNDER the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 14, the jurisdiction of the Courts of Great Sessions in Wales as to recoveries is

The omission to enter a recovery

Sect. 33. For passing accounts of sheriffs of county of Chester and principality of Wales.

Sect. 34. Attornies-general of county of Chester and of Wales to continue until his Majesty shall otherwise appoint.

Sect. 35. When quarter sessions are to be held.

Sect. 36. How landlords to recover possession of lands where their right of entry accrues in or after Hilary or Trinity Terms respectively.

Sect. 37. Declaration to be intitled specially.

Sect. 38. Writ of possession may issue on certificate of Judge, &c.

Sect. 39. Commencement of act.

The action by concessit solvere in Wales cannot be commenced by notice, but only by original. (*Phillips* v. *Williams*, E. T. 1829, Ex., 3 Y. & J. 207).

The Courts above have no jurisdiction, by the Welsh Judicature Act, (5 Geo. 4, c. 106, s. 2), to arrest the judgment in a cause tried in Wales. *Vaughan*, B., dubitante. (*Powell* v. *Salisbury*, T. T. 1828, Ex., 2 Y. & J. 391).

By the Welsh Judicature Act, (5 Geo. 4, c. 106, s. 21), it is enacted, "That, in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall not amount to 50*l.*, and it shall appear, on the evidence given on the trial, that the cause of action arose in the principality, and that the defendant was resident in Wales at the time of the service of any writ, or other mesne process served on him in such action, and it shall be so testified under the hand of the Judge who tried the cause, a judgment of nonsuit shall be entered:"—Held, that it is discretionary in the Judge who tries the cause to grant or refuse the certificate mentioned in the act; and that, where the Judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered. (*Jones* v. *Kenrick*, T. T. 1828, K. B., 8 B. & C. 337; S. C. 1 M. & M. 170).

in the Court of Great Sessions of Wales may be amended by the Court of C. P.*

transferred to this Court; and by sect. 27, it is enacted, that "the Court of Common Pleas shall have the like power and authority to amend the records of fines and recoveries passed heretofore in any of the Courts abolished by this act, as if the same had been levied, suffered, or had in the Court of Common Pleas."

The Court held, where the officer of the Court of Great Sessions had omitted to enter of record a recovery duly suffered at bar in 1804, that this Court had the same power to amend such recovery as if it had been suffered in this Court; and an order nisi obtained for such recovery, being entered nunc pro tunc, was made absolute accordingly.

JARDINE *v.* LEWIS, E. T. 1829. K. B. 9 *B. & C.* 545.

The Court in banco have no power as to a certificate as to costs, unless the Judge who tried the cause has certified †.

THE cause was tried in an English county, the cause of action having arisen in Wales. The plaintiff having recovered less than 50*l.*, the Judge gave the following certificate on the back of the Nisi Prius record:—I do hereby certify, that it appeared, upon the evidence given on the trial of this cause, that the cause of action arose in the principality of Wales, and it was proved, by persons who lived a few miles from the defendant's place of residence, that he had been resident for the last ten years in the dominion of Wales, that application for payment was made by the bankrupt before the bankruptcy, and by the assignees after the bankruptcy, by letters directed to the defendant in Wales, and it did not appear that he had any other place of residence, or was ever out of Wales, but no evidence was given of the issuing or service of the writ or other mesne process in this action, or of the place in which the defendant actually was at the time of the service of such writ or other mesne process—S. Gaselee. Upon this certificate, the defendant obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered. This rule was obtained upon the authority of the 5 Geo. 4, c. 106, s. 21.

Per Cur.—The Court in banco have no power to assist a defendant under the 5 Geo. 4, c. 106, s. 21, unless the Judge who tried the cause has certified; nor will they decide the question, whether certain special facts which are stated in the certificate bring the case within the act or not. The Judge who tried the cause is himself

* See also ante, tit. *Recovery*.

† That part of the statute (13 Geo. 3, c. 51) which relates to the plaintiff paying costs to the defendant, in personal actions arising in Wales and tried in England, unless 10*l.* is recovered, is wholly repealed from the 24th June, 1824; and the 2nd section of 5 Geo. 4, c. 106, enacting nearly similar provisions, except 50*l.* be recovered, did not come into operation till the 6th November, 1824: so that, in all actions tried between those days, neither of the statutes applies, and the plaintiff gets the same costs as if the cause arose entirely in England. (*Moore* v. *Williams*, 1824, N. P., 1 C. & P. 468).

The 5 Geo. 4, c. 106, s. 2, authorizes applications to the three superior Courts for new trials, &c., in actions tried in the Courts of Great Sessions in Wales. Previous to such an application, the transcript of the record ought to be transmitted from the inferior to the superior Courts. The same statute leaves the costs of such applications in the discretion of the Court above. This Court refused the costs of rules discharged where the applications were proper as founded on the permission of the Judge below. (*Tyson* v. *Thomas*, H. T. 1825, Ex., 1 M. & Y. 119).

to decide upon those facts, and is either to grant or refuse the certificate in the terms given by the act.

HOWELL *v.* HOWELL, E. T. 1827. K. B. 6 *B. & C.* 427.

Under 3 Geo. 4, c. 106, the Court has a discretionary power as to granting a new trial.

THIS was an action tried at the Great Sessions in Wales, in which the plaintiff failed. He subsequently had applied to this Court under the 3 Geo. 4, c. 106, s. 2, for a rule to shew cause why there should not be a new trial, and he had obtained a rule. But previously to this judgment had been entered up against him in the Court of Great Sessions under the authority of the 4th section of that act, which provides that no judgment should be delayed or stayed in that Court, unless the party intending to move for a new trial should first enter into a recognizance with two sufficient sureties, to be approved of by the Court, conditioned for the payment of the damages, if any, and also of the costs to be awarded by the Court of Great Sessions.

Per Cur.—The recognizance is in the nature of bail in error. If not given, the proceedings will not be stayed. But the unsuccessful party on the trial in one case, or in the suit in the other, may still go on: and if, in one case, he succeeds in getting the judgment reversed, he may have a writ of restitution to restore him to all that he has lost by the judgment; and, in the other, if he succeeds upon his motion, he shall have a new trial, and if he be successful upon that, he will be entitled to restitution in case the judgment shall have been acted upon. The plaintiff has, therefore, a right to go on with the rule he has obtained.

Warrant. See tits. *Commitment—Justice of the Peace—Sheriff.*

Warrant to prosecute and defend*.

Warrant of Attorney.

I. RELATIVE TO THE STAMP, p. 588.

II. RELATIVE TO THE PARTIES TO, AND IN WHAT NAME, p. 589.

* By Reg. Gen., H. T. 2 Will. 4, "Warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll."

By Reg. Gen., H. T. 4 Will. 4, "No entry shall be made on record of any warrant of attorney to sue or defend."

By Reg. Gen., H. T. 1838, C. P., "Warrants of attorney to prosecute or defend need not be filed at any stage of the cause."

III. RELATIVE TO THE CONSIDERATION, p. 589.

IV. RELATIVE TO ITS EXECUTION.

(*a*) In general.

1. *Before* 1 & 2 *Vict. c.* 110, p. 590.

2. *Since* 1 & 2 *Vict. c.* 110, p. 590.

(*b*) By prisoners, 592.

V. RELATIVE TO THE FILING OF, p. 592.

VI. RELATIVE TO THE CONSTRUCTION OF, p. 593.

VII. RELATIVE TO CHARGING DEFENDANT IN EXECUTION ON JUDGMENT ON, p. 593.

VIII. RELATIVE TO BEING RECEIVED IN EVIDENCE, p. 593.

IX. RELATIVE TO ENTERING SATISFACTION, p. 594.

X. RELATIVE TO THE JUDGMENT.

(*a*) By and against whom entered up, and effect of plaintiff's or defendant's death, p. 594.

(*b*) Application to sign judgment, and rule for, p. 595.

(*c*) For what amount to be signed, p. 596.

(*d*) Of the affidavit, p. 596.

(*e*) Of the demand, when necessary before judgment, p. 597.

(*f*) As to the Great Sessions in Wales, p. 598.

(*g*) Assigning breaches on, p. 598.

XI. RELATIVE TO SETTING ASIDE THE WARRANT OF ATTORNEY, AND JUDGMENT THEREON, p. 599.

XII. RELATIVE TO SCI. FA. CONNECTED WITH, p. 600.

I. RELATIVE TO THE STAMP*.

* A stamp of 1*l.* on a warrant of attorney given for a sum exceeding 50*l.*—Held, insufficient; and, although joint and several, cannot be enforced against one. (*Solari* v. *Yorston*, E. T. 1839, 2 P. & D. 338).

II. RELATIVE TO THE PARTIES TO*, AND IN WHAT NAME.

ASHLIN *v.* LAINGTON, T. T. 1834. C. P. 4 *M. & Scott*, 719.

If an infant join in a warrant of attorney, his name will be struck out†.

THREE defendants, one of whom was an infant, entered into a warrant of attorney, on which judgment was entered up. On a rule for setting aside the judgment, upon the ground of one of the defendants being an infant—

Per Cur.—In *Motteux* v. *St. Aubin and Others*, (2 Wm. Bl. Rep. 1133), upon a motion to set aside the judgment against the infant only, and to strike his name out of the warrant of attorney upon cause shewn, *Gould*, J., said, "I have no doubt this is not a reversal of the judgment by writ of error, but the vacating the warrant of attorney against the infant for imposition, after which the judgment drops of course." Therefore, let the rule for setting aside the judgment as to the two adults be discharged with costs; and let the name of the infant be struck out.

III. RELATIVE TO THE CONSIDERATION‡.

* The 11 Geo. 4 & 1 Will. 4, c. 38, after reciting that doubts have arisen whether warrants of attorney, executed by insolvent debtors before adjudication made in the matters of their petitions, pursuant to the several acts passed for their relief, are to be deemed secret warrants of attorney within the meaning and provisions of an act passed in the third year of the reign of his present Majesty, intituled "The Act for preventing Frauds on Creditors by secret Warrants of Attorney to confess Judgment," enacts, "That such warrants of attorney executed, and to be executed as aforesaid, are not within the meaning and provisions of the said last-mentioned act; and that the same have been, are, and shall be valid and effectual, any thing in the said last-mentioned act, or in any act extending the provisions thereof, notwithstanding."

† Where judgment is signed by mistake against a married woman alone, on a warrant of attorney given by her dum sola, a rule nisi only will be granted for vacating that judgment, and signing another against the husband and wife. (*Pocock* v. *Fry*, M. T. 1839, B. C., 8 D. P. C. 120). And it may be granted against him, although no notification of the matter is made to him. (*Higginbottom* v. *Higginbottom*, M. T. 1839, B. C., 8 D. P. C. 126). Upon a warrant of attorney to the wife before marriage—Held, that the plaintiffs must verify not only the marriage, but the due execution of the warrant, and that the debt still remained unpaid, although not a year old. (*Metcalfe* v. *Boote*, T. T. 1825, K. B., 6 D. & R. 46).

Where a party jointly executed a warrant of attorney—Held, that it was no objection, that the other had been taken in execution on a judgment for a larger sum, including the debt secured by the warrant, which had not been satisfied, or that no appearance had been entered prior to signing the judgment. (*Bircham* v. *Tucker*, T. T. 1840, C. P., 8 Scott, 469).

Misnomer is immaterial. Hence, where A. B. executed a warrant of attorney in the name of C. D., and judgment was entered up, and a fi. fa. issued against him by that name:—Held, that this was right, and that the sheriff was bound to execute it. (*Reeves* v. *Slater*, M. T. 1827, K. B., 7 B. & C. 486; S. C. 1 M. & Ry. 265).

‡ A warrant of attorney, given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the debtor's future liability, is valid as to his actual liability. (*Holdsworth* v. *Wakeman*, H. T. 1833, B. C., 1 D. P. C. 532). But a warrant of attorney for an old debt, not to oppose an insolvent, is void. (*Royers* v. *Kingston*, H. T. 1825, C. P., 2 Bing. 441).

IV. RELATIVE TO ITS EXECUTION.

(*a*) In general.

1. *Before* 1 & 2 *Vict. c.* 110*.

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2. *Since* 1 & 2 *Vict. c.* 110.

By the 1 & 2 Vict. c. 110, an attorney named by the defendant must be present, and attest the execution.

The 1 & 2 Vict. c. 110, s. 9, after reciting, that "it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a cognovit actionem, due information of the nature and effect thereof," enacts, "That, from and after the time appointed for the commencement of this act, no warrant of attorney to confess judgment in any personal action, or cognovit actionem given by any person, shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

Taylor *v.* Nicholl, H. T. 1840. Ex. 8 *D. P. C.* 212; S. C. 6 *M. & W.* 91.

The attorney attesting being named to defendant by the plaintiff's attorney will, under circumstances, be sufficient †;

On a rule, calling upon the plaintiff to shew cause why the warrant of attorney, judgment, execution, and levy thereon should not be set aside with costs—

The Court said, it was no ground for setting aside a warrant of attorney, that the defendant's attorney was suggested, in the first instance, by the plaintiff's attorney, provided he was actually adopted by the defendant as his attorney.

* Before the 1 & 2 Vict. c. 110, a defendant not in custody might execute a warrant of attorney without the presence of his attorney; but, with regard to prisoners, it was ordered by Reg. Gen., 2 Will. 4, "That no warrant of attorney to confess judgment, or cognovit actionem given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney."

† And where a defendant, who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, but adopts freely an attorney suggested by the plaintiff's attorney, that is a sufficient nomination of an attorney by the defendant, pursuant to 1 & 2 Vict. c. 110, s. 9. (*Hale* v. *Dale*, T. T. 1840, B. C., 8 D. P. C. 599). And where three defendants go to a particular attorney named by the plaintiff, and give him instructions to prepare a joint warrant of attorney from them to the plaintiff, and each of the defendants freely recognizes the attorney as acting for him, the warrant is good, notwithstanding the provisions of 1 & 2 Vict. c. 110, ss. 9, 10. (*Haigh* v. *Frost*, T. T. 1839, B. C., 7 D. P. C. 743). But the fact of the name of the attorney attesting the defend-

GRIPPER *v.* BRISTOW, T. T. 1840. Ex. 6 *M. & W.* 807; S. C. 8 *D. P. C.* 797.

but, in general, even an implied naming will not do.

ON motion to set aside judgment on a warrant of attorney—

The Court held, to give validity to a warrant of attorney, under the stat. 1 & 2 Vict. c. 110, s. 9, it is necessary that there should be something different from an implied naming or an implied attendance of the attorney on behalf of the party. It is necessary that the party naming the attorney, or adopting him, should be sensible of his having the right to exercise an option on the subject.

SANDERSON *v.* WESTLY, H. T. 1840. Ex. 6 *M. & W.* 98; S. C. 8 *D. P. C.* 412.

And if only one attorney present, it must be clear he was not the plaintiff's attorney;

A WARRANT of attorney was attested on behalf of the defendant by an attorney who had on previous occasions done business for the plaintiff, and had charged him with the expense of obtaining and preparing the warrant of attorney.

The Court held, that he was not an attorney "attending on behalf of the defendant" within the intention of the 1 & 2 Vict. c. 110, s. 9. Where, on the execution of a warrant of attorney, there is only one attorney present, it ought to be clear that he is not the plaintiff's attorney.

CHIPP *v.* HARRIS, T. T. 1840. Ex. 5 *M. & W.* 430.

but if the defendant be an attorney, no other attorney need be present.

ON shewing cause against a rule for setting aside a warrant of attorney, which had been obtained by a third party, on the ground that there had been no attorney on behalf of the defendant present at the execution of the instrument, it appeared that the defendant himself was an attorney; and in such a case it was contended, 1st, that the want of another attorney's attendance was no objection, under the 1 & 2 Vict. c. 110, ss. 9, 10, on the authority of *Walton* v. *Staunton*, (Barnes's Notes ,28); 2ndly, that the objection was not available to a third party.

Lord *Abinger*, C. B.—The object of the statute, as well as of the former rule of Court, was to protect the debtor; but as the debtor here was himself an attorney, I think that the case is not within the act of Parliament.

ant's execution having been suggested by the plaintiff's attorney—Held to be a ground for setting it aside, as not being a compliance with the statute. (*Kemp* v. *Matthew*, E. T. 1840, C. P., 8 Scott, 399). It is not a sufficient compliance with 1 Reg. Gen., H. T. 2 Will. 4, s. 72, that an attorney should be named by the plaintiff, and adopted by the defendant in custody on mesne process, when executing a warrant of attorney. (*White* v. *Cameron*, E. T. 1838, B. C., 6 D. P. C. 476). The Court set aside a warrant of attorney on the ground that the defendant's execution was attested by an attorney introduced by the plaintiff's attorney. (*Rice* v. *Linstead*, M. T. 1838, C. P., 6 Scott, 895).

Where the attorney for the defendant was his usual attorney, and named expressly by him on the occasion, yet it appearing that the same person was acting for the plaintiff, and prepared the security:—Held, not a compliance with the statute. (*Rising* v. *Dolphin*, H. T. 1840, B. C., 8 D. P. C. 309).

Where an attesting witness to a warrant of attorney refused to make an affidavit of the execution, to support a motion for judgment upon it, and it appeared that he was colluding with the defendant, the Court made a rule absolute, with costs, to compel him to do so. (*Ex parte Morrison*, M. T. 1839, B. C., 8 D. P. C. 94).

(*b*) By Prisoners*.

Cox *v.* Cannon, E. T. 1838. C. P. 4 *Bing. N. S.* 453.

If not known, a prisoner attorney may attest for another prisoner.

On motion to set aside a warrant of attorney, it appeared that a prisoner introduced an attorney, who was also a prisoner, and without his certificate, for the purpose of being present at the execution of a warrant of attorney.

The Court refused to set aside the warrant of attorney, the plaintiff being ignorant of the situation of the party introduced, and it not appearing that the defendant was equally so.

V. RELATIVE TO THE FILING OF.

Bennett *v.* Daniel, H. T. 1830. K. B. 10 *B. & C.* 500, *supporting* Morris *v.* Mellin, E. T. 1827. K. B. 6 *B. & C.* 446†.

The 3 Geo. 4, c. 39, only applies to bankruptcy, and not between the parties‡.

On the question, whether a warrant of attorney, which is subject to a defeazance, but which defeazance is not written on the warrant of attorney before it is filed, is void as between the parties, as well as against assignees of bankrupts and insolvents, under the 3 Geo. 4, c. 39, s. 4, and 7 Geo. 4, c. 57, s. 33—

Held, by Lord *Tenterden*, Mr. Justice *Bayley*, and Mr. Justice *Littledale*, that an omission so to write the defeazance does not avoid the warrant of attorney as between the parties, but only as against such assignees. Held, by Mr. Justice *Park*, (concurring with an opinion previously given by Mr. Justice *Holroyd*), that

* See, also, Reg. Gen., H. T. 2 Will. 4, ante, p. 590. Where, the defendant being arrested, the plaintiff's attorney, who had formerly advised him, proposed and brought another attorney to read over and attest the warrant of attorney executed by the defendant, but he was not known to, or sent for by him:—Held, not a compliance with the Rule, E. T. 4 Geo. 2, and proceedings set aside. (*Walker* v. *Gardner*, T. T. 1832, K. B., 4 B. & Ad. 371).

If a prisoner seeks to take advantage of 1 Reg. Gen., H. T. 2 Will. 4, s. 72, on the ground of the absence of an attorney on behalf of the prisoner, at the execution of a warrant of attorney, it is incumbent on him to shew that he is in custody on mesne process, and it is not necessary for the plaintiff to shew that the defendant is not. (*Lewis* v. *Gompertz*, M. T. 1837, B. C., 6 D. P. C. 7).

† The 4th sect. of the stat. 3 Geo. 7, c. 39, which requires the defeazance to a warrant of attorney to be written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney &c. as fall within the former sections of the act, viz. warrants of attorney which, in the event of not being filed within twenty-one days after execution, are void against the assignees of a bankrupt; and consequently, a warrant of attorney subject to a defeazance, not written on the same paper or parchment, is not void against the assignee of an insolvent debtor:—Held, by Lord *Tenterden*, C. J., *Bayley* and *Littledale*, Js.; *Holroyd*, J., dissentiente. (*Morris* v. *Mellin*, E. T. 1827, K. B., 6 B. & C. 446).

‡ The stat. 3 Geo. 4, c. 39, requiring a warrant of attorney to be filed within twenty-one days after execution, otherwise to be void and fraudulent against assignees, is confined to the case of a valid commission; therefore, such warrant of attorney, though not filed under the statute, is good against a party acting as assignee under a commission illegally sued out. (*Aireton* v. *Davis*, E. T. 1833, C. P., 3 M. & Scott, 138; S. C. 9 Bing. 740).

such omission rendered the warrant of attorney altogether void, even as between the parties.

DILLON *v.* EDWARDS, H. T. 1829. C. P. 2 *M. & P.* 550.

The affidavit of filing must state the day on which the warrant was executed.

The stat. 3 Geo. 4, c. 39, s. 1, enacts, "That, within twenty-one days after the execution of every warrant of attorney to confess judgment in a personal action, such warrant must be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments." An affidavit, filed with the warrant of attorney, stated that the defendant was present and saw the warrant of attorney, dated the 25th of April, 1827, signed, sealed, and delivered by the party in the warrant named, and delivered as and for his act and deed—

The Court held the affidavit not sufficient, inasmuch as it did not set forth the time of the signing, sealing, and delivery, within the terms of the statute.

VI. RELATIVE TO THE CONSTRUCTION OF.

WOOLLEY *v.* JENNINGS, H. T. 1826. K. B. 5 *B. & C.* 165; S. C. 2 *C. & P.* 144.

"To secure the payment of £——," with interest, is a continuing security.

A WARRANT of attorney was given with a defeazance, stating it to be given "as a security for 4000*l.*, and lawful interest thereon."

The Court held, that it was to be construed as a continuing security, and not merely as a security for money then due.

VII. RELATIVE TO CHARGING DEFENDANT IN EXECUTION ON JUDGMENT ON*.

VIII. RELATIVE TO BEING RECEIVED IN EVIDENCE.

SYLVESTER *v.* ANTHONY, E. T. 1832. C. P. 9 *Bing.* 746.

The copy of a warrant of attorney filed under the 3 Geo. 4, c. 39, is evidence.

IN support of this case, the clerk of the docket and judgment office produced a copy of the joint warrant of attorney from Pearson and Fourneaux to the plaintiff, with an affidavit annexed, that it was filed under the 3 Geo. 4, c. 39, and that it was a true copy. It was objected for the plaintiff that this document could not be received in evidence, as it was incumbent on the defendant to produce the original warrant of attorney. The clerk to the defendant's attorney proved the service of notice on the plaintiff to produce the original

* On a warrant of attorney, subject to a defeazance, stating that the warrant is given to secure a certain sum to be paid by instalments, after the defendant has been taken in execution for one instalment, he may be brought up by habeas corpus and charged further in execution with the second instalment, without a rule to shew cause why he should not be so charged. (*Davis* v. *Gompertz*, M. T. 1833, K. B., 2 D. P. C. 407; S. C. 2 N. & M. 607).

warrant. It was also proved by the clerk of the docket office that the warrant of attorney copy was filed by Sylvester and Walker on the 20th of September, 1831; as a matter of course, the original must be filed at the time of signing judgment; but as he (the officer) was not desired, he did not look for that document. The Lord Chief Justice was of opinion, that, as the stat. of 3 Geo. 4, c. 39, authorized the filing of the copy, such copy should be received. The copy of the joint warrant of attorney from Pearson and Fourneaux to the plaintiff was then put in and read.

Tindal, C. J.—It appears to me, that, if a party wish to avail himself of the power granted by the 3 Geo. 4, c. 39, and file a copy of the warrant of attorney, for the purposes there specified, from the moment such copy is filed, it becomes to all intents and purposes an original; from that moment its contents are evidence of the contents of the original, and the party filing such document estopped from saying, that the original contains anything not to be found in the copy. The 7th section enacts, "That any person shall be entitled to have an office copy of such warrant of attorney or cognovit actionem, or the copy thereof, filed as aforesaid." From this, I think, it clearly follows, that the copy filed under the statute is to be considered as an original against the plaintiff in this action, and against all who claim under him. It is my opinion that it is an original, and has been sanctioned by the Legislature as such.

IX. RELATIVE TO ENTERING SATISFACTION.

ATKINSON *v.* JONES, H. T. 1835. K. B. 2 *Ad. & E.* 439.

Satisfaction cannot be entered unless clear it is not a continuing security.

THE warrant was given by a surety as a security for payment of mortgage interest to the day stipulated for payment of the principal, and if default made in such payment, execution should issue for all interest then due, and "thenceforth to accrue due;" the interest up to the day having been paid, and application made to have satisfaction entered on the roll—

The Court held, that it not being clear that it was not intended that the security extended to subsequent arrears of interest, and no execution having issued, the motion was premature.

X. RELATIVE TO THE JUDGMENT*.

(*a*) BY AND AGAINST WHOM ENTERED UP, AND EFFECT OF PLAINTIFF'S OR DEFENDANT'S DEATH.

HENSHALL *v.* MATTHEW, H. T. 1831. C. P. 7 *Bing.* 337; S. C. 5 *M. & P.* 337.

An indorsement that A. B., his

ON motion to enter judgment up on an old warrant of attorney, dated the 1st of October, 1829 (the warrant of attorney empowered

* A general authority to sign judgment as of Hilary Term does not render a judgment, signed of a particular day in that term, irregular. (*Todd* v. *Gompertz*, H. T. 1838, B. C., 6 D. P. C. 296).

the plaintiff to enter up judgment against the defendant for 400*l.* By a memorandum indorsed thereon, it was stated that the object of the warrant of attorney was to secure to the plaintiff, his heirs, executors, administrators, and assigns, the payment of 200*l.*)—

heirs, executors, &c., may enter up judgment, does not enable the executor to do so*.

Lord Chief Justice *Tindal.*—In *Coles* v. *Haden*, (Barnes, 44), the warrant of attorney expressly authorized that judgment should be entered up by the plaintiff, or his executors, &c.; but here the plaintiff only is authorized. The memorandum is of no use. These authorities must be strictly pursued.—Rule refused.

HEATH *v.* BRINDLEY, M. T. 1834. K. B. 4 *N. & M.* 235.

Judgment cannot be entered after the defendant's death without a sci. fa.†

THIS was an application for a rule to set aside a judgment signed on a warrant of attorney. There were two objections: one of them was, that the judgment was signed more than a year and a day from the date of the warrant of attorney; and the other, that the defendant was dead at the time of the judgment signed.

The Court held, that a party cannot enter up judgment on a warrant of attorney after the death of the defendant without having it revived by sci. fa., although the warrant of attorney expressly reserves a power to enter up judgment notwithstanding the death of the defendant.

(*b*) APPLICATION TO SIGN JUDGMENT, AND RULE FOR‡.

* The Court will not allow judgment to be entered up on a warrant of attorney at the instance of an executor, where the testator only has been mentioned in the warrant, although it is stated in the defeazance that the "executors and administrators" might enter up judgment in the event of a certain sum not being paid. (*Foster* v. *Claggett*, E. T. 1838, B. C., 6 D. P. C. 524). Where a warrant of attorney only authorizes judgment to be entered up at the suit of the plaintiff, without mentioning executors, administrators, &c., the Court will not allow judgment to be entered up at the suit of the plaintiff's executor, although such representatives are mentioned in the defeazance. (*Manvill* v. *Manvill*, H. T. 1833, B. C., 1 D. P. C. 541).

Where the warrant by two was joint and several, and authorized the attornies to enter up judgment against both, the Court, after judgment signed against one, allowed it to be signed against the other; and an affidavit, that he had put in an answer to a bill in Chancery within the term—Held, sufficient. (*Stoveld* v. *Eade*, M. T. 1832, C. P., 2 M. & Scott, 361).

It is no objection to signing judgment on a warrant of attorney under fifteen years old, that the defendant is insane. (*Piggott* v. *Killick*, M. T. 1835, B. C., 4 D. P. C. 287).

A stipulation, that judgment shall not be entered up on a warrant of attorney before a certain day, unless the conusor shall in the mean time have become bankrupt or insolvent, does not oust the conusee from the right to enter up judgment before the day specified if the conusor be in insolvent circumstances, although he may not have become bankrupt, or taken the benefit of an Insolvent Debtors Act. (*Biddlecombe* v. *Bond*, M. T. 1835, K. B., 5 N. & M. 621).

† Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name. (*Hind* v. *Kingston*, E. T. 1838, B. C., 6 D. P. C. 523; S. P. *Spong* v. *Tucker*, H. T. 1827, Ex., 1 Y. & J. 206). Where a warrant of attorney is given to three for a joint debt due to them, and no mention is made either in the warrant or defeazance of survivors, judgment, however, may be entered up at the suit of the survivors. (*Build* v. *Wightman*, H. T. 1833, B. C., 1 D. P. C. 545).

‡ By Reg. Gen., H. T. 2 Will. 4, leave to enter up judgment on a warrant of attorney above one year, and under ten years old, must be obtained by a motion

(*c*) For what amount to be signed*.

(*d*) Of the affidavit.

Field *v.* Bearcroft, H.T. 1832. Ex. 2 *C. & J.* 217; S. C. 2 *Tyrw*, 283.

The attesting witness, if alive, though the commissioner, must make the affidavit†.

On motion to enter up judgment on an old warrant of attorney, without an affidavit by the attesting witness of the due execution thereof, the commissioner before whom the affidavit of the party being alive was sworn being the attesting witness, it was contended that this was a sufficient authentication of the instrument.

in term, or by order of a Judge in vacation, and, if ten years old or more, upon a rule to shew cause. Since the Rule, 1 Reg. Gen., H. T. 2 Will. 4, s. 73, a rule absolute in the first instance for judgment on a warrant of attorney more than ten years old cannot be granted, although the defendant, shortly before the application, has acknowledged the debt to be due. (*Nicholas* v. *Merit*, M. T. 1840, B. C., 9 D. P. C. 101). And it is indispensable that the warrant itself be produced. (*Jacobs* v. *Neville*, M. T. 1839, B. C., 8 D. P. C. 125).

* Where a warrant of attorney makes no mention of interest on the principal, but the defeazance does, the Court will allow execution to be issued for the principal and interest. (*Shipton* v. *Shipton*, H. T. 1833, B. C., 1 D. P. C. 518).

† The affidavit of the attesting witness to a warrant of attorney cannot be dispensed with merely on the ground of his illness. (*Owen* v. *Holles*, H. T. 1836, B. C., 4 D. P. C. 572). On moving to sign judgment on a warrant of attorney, it is not a sufficient excuse for not producing an affidavit of the attesting witness, that an application to a person acquainted with the witness's address has been unsuccessful in obtaining it, although the handwriting of the defendant and the witness to the warrant of attorney is verified. (*Cope* v. *Lea*, M. T. 1840, B. C., 9 D. P. C. 102). Where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit on signing judgment is sufficiently supplied by that of his master verifying the handwriting of his clerk and of the defendant, and stating that the former has absconded and cannot be found. (*Young* v. *Showler*, T. T. 1834, B. C., 2 D. P. C. 556). The Court allowed judgment to be entered up on an old warrant of attorney upon an affidavit of the plaintiff's agent, that he saw the defendant execute it, and that the defendant being indebted to the plaintiff in a sum of —— on a note, the defendant executed the warrant to secure that sum. (*Huthwaite* v. *Hood*, M. T. 1830, C. P., 5 M. & P. 321). Semble, that the Court will not grant permission to enter up judgment on an old warrant of attorney executed by a marksman, where it is only sworn that the warrant was "duly executed," and it is not stated that it was read over to the defendant. (*James* v. *Harris*, M. T. 1837, C. P., 6 D. P. C. 184).

The title of the affidavit for leave to enter up judgment need not be intitled in any cause, but simply "In the King's Bench." (*Ex parte Gregory*, T. T. 1828, K. B., 8 B. & C. 409). An affidavit in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending) need not be intitled in any cause. (*Davis* v. *Stanbury*, H. T. 1835, Ex., 3 D. P. C. 440).

The judgment, according to the New Rules, relating to the day on which it is signed, it is now no longer necessary that the affidavit to enter up judgment on a warrant of attorney should state that the party was alive on a day *in* the term. (*Cockman* v. *Hellyer*, T. T. 1834, C. P., 4 M. & Scott, 489; S. C. 1 Bing. N. S. 3). Since the 3 Reg. Gen., Hil. 4 Will. 4, judgment may be entered up on an old warrant of attorney, although the affidavit does not shew the party to have been alive within the term. (*Watts* v. *Bury*, T. T. 1835, B. C., 4 D. P. C. 44).

In order to obtain leave to sign judgment on an old warrant of attorney, it is necessary to shew that the defendant was "alive," and not merely "seen," within a reasonable time before the application. (*Chell* v. *Oldfield*, H. T. 1836, B. C., 4 D. P. C. 629). The Court will now grant a rule to enter up judgment

Per Cur.—The commissioner has not sworn to the due execution; but, at the utmost, this merely amounts to an assertion.

(*e*) OF THE DEMAND, WHEN NECESSARY BEFORE JUDGMENT.

CAPPER *v.* DANDO, H. T. 1833. K. B. 4 *N. & M.* 335.

Where a demand is to be made before judgment, it cannot be made if defendant becomes insane.

A WARRANT of attorney executed in September, 1825, had been given by the defendant to secure the re-transfer of stock, which had been advanced by the plaintiffs as trustees under a marriage settlement. By the defeazance, the re-transfer was to be made on demand. On motion to enter up judgment, stating that the defendant was at this time deranged, and that no demand could of course be substantially made, but that it had been made in form, which he contended was a sufficient compliance with the condition—

The Court held, that, where a demand is to be made before judgment, it cannot be made if the defendant has become insane.

on a warrant of attorney upon an affidavit shewing that the defendant was alive within a reasonable time, whether the day on which he is shewn to have been alive be in term or not. The Court granted a rule moved for on the third day of term, upon an affidavit stating that the defendant was alive on a day six days previously to the commencement of the term. (*Jordan* v. *Farr*, H. T. 1835, K. B., 4 N. & M. 347). To obtain judgment on a warrant of attorney, there must be a positive affidavit that the defendant is alive, or has been seen alive, within a reasonable period; mere inference is not sufficient, even though it appears that the defendant keeps out of the way. Personal service of the rule nisi on the defendant will be dispensed with where it appears that he keeps out of the way. (*Croft* v. *Lord Egmont*, M. T. 1839, B. C., 8 D. P. C. 95). In appearing to sign judgment on a warrant of attorney, it is insufficient for the deponent to swear that he believes the defendant to be alive from information which he has received, unless he also swears that he believes the information to be true. (*Reeder* v. *Whip*, E. T. 1837, B. C., 5 D. P. C. 576). In order to obtain judgment on an old warrant of attorney, it is sufficient if the affidavit states that the defendant was "seen alive within ten days." (*Krell* v. *Jay*, H. T. 1836, B. C., 4 D. P. C. 600). Where a defendant was seen alive in England on the 20th February, the Court allowed judgment to be signed against him in Easter Term on an old warrant of attorney, although he was still resident in France, but in what part was unknown. (*Bayley* v. *Western*, E. T. 1839, B. C., 7 D. P. C. 601). The Court allowed judgment to be entered up on an old warrant of attorney on the 5th November, the defendant not having been seen alive since the 30th of the previous September. (*Stocks* v. *Welles*, M. T. 1836, B. C., 5 D. P. C. 221).

On applying for judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive that a letter in his handwriting has been received. (*Gray* v. *Withers*, H. T. 1836, B. C., 4 D. P. C. 636). Shewing the party alive, by a letter dated abroad six weeks before—Held, sufficient. Judgment allowed to be entered up on an affidavit of a letter received from the party, bearing a post-mark within the term. (*Anon.*, T. T. 1833, C. P., 3 M. & Scott, 210). In applying to sign judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive to shew that a cheque of his has been paid, dated thirteen days before the application. (*Jacobs* v. *Griffiths*, E. T. 1837, B. C., 5 D. P. C. 577).

Where a defendant is resident in the West Indies, a judgment may be signed against him on a warrant of attorney if seen alive four months before. (*Fursey* v. *Pilkington*, H. T. 1834, B. C., 2 D. P. C. 452). The Court allowed judgment to be entered up on a warrant of attorney above one and under ten years old, upon an affidavit that the defendant had been seen and conversed with by the deponent twenty-seven days before the motion was made. (*Powell* v. *Howard*, M. T. 1838, C. P., 6 Scott, 826). The Court allowed judgment to be signed on

(*f*) As to the Great Sessions in Wales*.

(*g*) Assigning breaches on.

Shaw *v.* Marquis of Worcester, H. T. 1830. C. P. 6 *Bing.* 385.

On a judgment in debt and warrant of attorney for non-payment of an annuity, breaches need not be assigned.

In this case a judgment had been entered up on a warrant of attorney, in an action of debt upon a mutuatus for 3400*l.*; and it appeared on the face of the warrant of attorney, that, on the treaty for the purchase of an annuity, it was agreed that such warrant of attorney should be given, and that judgment should be forthwith entered up under it for the better securing the payment of the annuity; and, on an application by the defendant to set aside the writ of execution which had been issued for the amount of the arrears of the annuity, on the ground that the plaintiff ought to have suggested breaches of the covenant for payment of the said annuity, which covenant appeared in the recital contained in the warrant of attorney, under the stat. 8 & 9 Will. 3, c. 11, s. 8—

Per Cur.—The statute enacts, "That, in all actions upon any bond or bonds, on any penal sum for non-performance of any covenants or agreements, in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession, or nil dicit, the plaintiff, upon the bill, may suggest as many breaches as he shall think fit;" and the question is, whether a judg-

an old warrant of attorney, the application being made on the 5th of November, in Michaelmas Term, although the defendant had not been seen alive since two or three days before the 1st of March previous, and then in New South Wales. (*Johnson* v. *Fry*, M. T. 1836, K. B., 5 D. P. C. 215).

Where the warrant was given as a guarantie, an affidavit that the guarantie still remained in force and effect—Held, sufficient, although not stated that any sum was due. (*Pickering* v. *Carnell*, H. T. 1840, B. C., 8 D. P. C. 300).

Judgment may be obtained on an old warrant of attorney, though only an office copy of the affidavit of its due execution is produced. (*Webb* v. *Webb*, H. T. 1836, B. C., 4 D. P. C. 599).

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the Court will not allow judgment to be entered up. (*Baldwin* v. *Atkins*, T. T. 1834, B. C., 2 D. P. C. 591).

An affidavit by the plaintiff's attorney, that the debt is unpaid, is sufficient to support a motion to enter up judgment on an old warrant of attorney, where the attorney swears that he has been employed in managing the money, and receiving and paying over the interest. (*Ashman* v. *Bowdler*, M. T. 1833, Ex., 4 Tyrw. 84; S. C. 2 C. & M. 212). Affidavit by the plaintiff of the debt being still due, and that he saw the defendant execute it; that the attesting witness was now residing in France, and had seen the defendant alive within the term:—Held, sufficient. (*Taylor* v. *Leighton*, T. T. 1833, C. P., 3 M. & Scott, 423). In order to enter up judgment on an old warrant of attorney, an affidavit by the plaintiff, stating the money to be still due, is necessary, unless its absence is accounted for, although the defendant has agreed that judgment shall be entered up. (*Barton* v. *Turner*, M. T. 1839, B. C., 8 D. P. C. 122).

* The Court of Exchequer cannot order judgment to be entered up in that Court on a warrant of attorney to confess judgment in the Great Sessions in Wales, given previously to the stat. 1 Will. 4, c. 70. (*Williams* v. *Williams*, E. T. 1831, Ex., 1 C. & J. 387; S. C. 1 Tyrw. 351).

ment signed under this warrant of attorney falls within the letter of the act, or the mischief intended to be prevented thereby. As the law stood at the time this act was passed, if there was a judgment in a court of law for a penal sum, either upon a demurrer or upon a cognovit actionem, or by default, the defendant was exposed to the danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was passed to prevent such a mischief, by compelling the plaintiff to shew, upon the record in the court of common law, the amount of the debt or damages really due, and of enabling the defendant to dispute such amount before a jury, thus making an appeal to a court of equity altogether unnecessary. But a warrant of attorney to enter up a judgment as a security for a debt or demand was known in practice to the courts of law long before the passing of the statute of William. It was a proceeding subject to their cognizance and interference from the earliest times, and has been regulated by various Rules of Court, as the protection of the defendant, or the purposes of justice, seemed to demand; such an instrument, therefore, does not appear to be within the mischief of the act.

XI. RELATIVE TO SETTING ASIDE THE WARRANT OF ATTORNEY, AND JUDGMENT THEREON.

MARTIN *v.* MARTIN, T. T. 1832. K. B. 3 *B. & Ad.* 934.

Judgment signed under fraud will be set aside *.

Judgment on a warrant of attorney had been signed and execution issued under circumstances of collusion between the plaintiff and defendant, accompanied by fraud and breach of good faith towards the landlord, whose interest was affected by the execution.

The Court set aside the judgment.

* A defendant is not precluded from moving to set it aside for non-compliance with the 1 & 2 Vict. c. 110, by his having become bankrupt since executing it. (*Taylor* v. *Nicholls*, H. T. 1840, Ex., 6 M. & W. 91; S. C. 8 D. P. C. 242). Judgment was signed on the warrant of attorney, and execution issued on the 13th of May. The rule to set aside the warrant of attorney and writ of fi. fa. was obtained on the 9th of June:—Held, per *Alderson*, B., that, whether or not the non-compliance with the terms of the statute was an irregularity only, the facts did not constitute a waiver by delay. (*Gripper* v. *Bristow*, T. T. 1840, Ex., 6 M. & W. 807; S. C. 8 D. P. C. 797). The Court will, upon motion, set aside a warrant of attorney, judgment, and execution, on the ground that they are fraudulent against creditors, provided the facts upon which the alleged fraud depends are clearly made out by the affidavits; but where those facts are disputed, they will direct an issue to try the question of fraud. (*Harrod* v. *Benton*, E. T. 1828, K. B., 8 B. & C. 217; S. C. 2 M. & R. 130).

Where a party gives a warrant of attorney to another, without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a court of law will not interfere. (*Dukes* v. *Saunders*, H. T. 1833, B. C., 1 D. P. C. 522).

To entitle a defendant to relief from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by the plaintiff, on the ground of infancy, the defendant at the time keeping a shop, and acting as if he were of

XII. RELATIVE TO SCI. FA. CONNECTED WITH.

HISCOCKS *v.* KEMP, T. T. 1835. K. B. 5 *N. & M.* 113, *supporting* WITHERS *v.* HARRIS, 7 *Mood.* 64.

If clearly the intention of the parties that the judgment was not to be revived, no sci. fa. is necessary*.

ON the 5th of June, 1824, the defendant had executed a warrant of attorney for the sum of 420*l.*, payable on the 5th of December, 1826; and it was thereby agreed that the plaintiff should enter up judgment at his pleasure, and, in case of default in payment of the sum of 420*l.*, that he should issue execution, and levy the same, &c., with two provisoes, which it is not material to state. On the 27th of May, 1825, judgment was signed upon the above warrant of attorney, and on the 5th of February, 1827, the defendant was taken in execution, and had remained in custody some years; but it was ascertained that no judgment roll had been carried in, or sci. fa., to revive the judgment recorded in the judgment-office. A rule had been obtained, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Marshal, as to this action, for irregularity; and the affidavits in answer to the rule admitted that no sci. fa. had been sued out, alleging, as a reason for not doing so, a special agreement by parol between the plaintiff and the defendant waiving the necessity of a revival of the judgment by sci. fa.

The Court held, that where, by a defeazance to a warrant of attorney, it appears to have been in the contemplation of the parties that execution should be had after a year and a day from the signing of the judgment, it is not necessary that the plaintiff should sue out a sci. fa. to revive the judgment, but he is at liberty to sue out execution upon the judgment, after a year and a day, without reviving the judgment by sci. fa.

age, he ought to make out a clear case; merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient for the Court to act upon. (*Weaver* v. *Stokes*, H. T. 1836, Ex., 4 D. P. C. 724; S. C. 1 M. & W. 203).

In an application for the delivering up of a warrant of attorney, the affidavits may be intitled in a cause. (*Thompson* v. *Vaux*, T. T. 1837, B. C., 5 D. P. C. 691).

* The Court will stay proceedings in a sci. fa. on a judgment on a warrant of attorney, on a suggestion that matters occurred before the signing of the judgment from which it would appear that nothing was due to the plaintiff, and refer the case to the Master to report. (*Greenslade* v. *Vaughan*, T. T. 1840, B. C., 8 D. P. C. 687).

Warehouseman.

See 6 *Geo.* 4, *c.* 112.

GILBERT *v.* DALE, M. T. 1836. K. B. 1 *N. & P.* 22.

A warehouseman or bookkeeper merely receiving goods to be forwarded is not primâ facie liable in case of loss*.

IN assumpsit, it appeared that the plaintiffs were tailors, from whom one Jeffries had ordered some clothes, which were to be sent directed in the way described in the declaration. The clothes in question were made pursuant to the order, were packed and directed accordingly, and sent to the booking-office of the defendant, to be forwarded according to the direction. It was also proved, that the goods never arrived at their place of destination. Upon this, it was objected by the counsel for the defendant, that the plaintiffs ought to be nonsuited—first, on the ground, that there was no proof of these being the goods of the plaintiffs, as the clothes were made for Mr. Jeffries, and by delivering them at the booking-office, directed to him, the property in them passed to him; and, secondly, that there was no proof of negligence. Lord *Denman*, C. J., thinking the objection valid, nonsuited the plaintiffs.

The Court held, that where goods are delivered into the possession of a warehouseman or of a booking-office keeper, for the purpose of being forwarded by him to the place where such goods are directed, proof that the goods never arrived at the place to which they were directed, is not primâ facie evidence that they were lost by the negligence and carelessness of the booking-office keeper.

LEUCKHART *v.* COOPER, T. T. 1836. C. P. 3 *Bing. N. S.* 99; S. C. 3 *Scott*, 521.

A plea of lien in London on all foreign consignments is bad.

A PLEA of a custom for all public warehouse-keepers, in the city of London, to have a general lien upon all goods from time to time housed or remaining in their warehouses, for and in the name of the merchants or other persons by whom such public warehouse-keepers are retained or employed, for all monies, or any balance thereof, due from such merchants or other persons to such public warehouse-keepers, for or on account of advances or expenses which such public warehouse-keepers should have made or been put to, in or about the paying of duties or of customs on goods consigned to them from abroad, or the payment of freight, and other charges for the conveyance of such goods to the port of London, or the entering, landing, and warehousing of such goods.

The Court held the plea bad in law; and, therefore, after verdict for the defendants on a plea stating such a custom, judgment non obstante veredicto was entered for the plaintiff.

* A booking-office keeper, who also keeps a wine vault, is guilty of negligence if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar behind the counter. (*Dover* v. *Mills*, M. T. 1831, N. P., 5 C. & P. 175).

Warranty.

I. RELATIVE TO WHAT AMOUNTS TO, AND WHAT IS A BREACH OF THE WARRANTY.

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(*b*) As to horses, p. 603.

II. RELATIVE TO THE CONSTRUCTION OF, AT WHAT TIME GIVEN, AND WITHIN WHAT TIME TO BE ENFORCED, p. 603.

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IV. RELATIVE TO THE ACTION ON.

(*a*) Declaration, p. 605.

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I. RELATIVE TO WHAT AMOUNTS TO, AND WHAT IS A BREACH OF THE WARRANTY.

(*a*) In general.

Power *v.* Barham, H. T. 1836. K. B. 6 *N. & M.* 62; S. C. 7 *C. & P.* 356.

What amounts to, is a question for the jury*.

The defendant, on a sale of pictures, gave a bill of parcels to the plaintiff, in these words:—"Four pictures, views in Venice, Canaletto."

The Court held, that it was rightly left to the jury, to consider whe-

* The general rule is, that whatever a seller represents at the time of a sale is a warranty. A warranty may be either general or qualified. (*Wood* v. *Smith*, T. T. 1829, N. P., 4 C. & P. 45). But where the advertisement of a ship for sale described her as copper-fastened, and then followed "an inventory" of the masts, &c., the vessel and all stores to be taken with all faults; and afterwards a memorandum of agreement was prepared, not describing her as copper-fastened, referring to the inventory, which was stipulated to be made good only as to quantity, and the brig, with store, to be taken with all faults:—Held, that the description in the advertisement of being copper-fastened was not to be taken as part of the contract of sale, so as to amount to a warranty of being copper-fastened. (*Freeman* v. *Baker*, M. T. 1833, K. B., 2 N. & M. 446).

ther the defendant meant to warrant these four pictures to be the productions of the artist named, or only to express his opinion as to who was the artist; and the jury having found that it was a warranty—

The Court refused a rule for a new trial.

(*a*) As to horses.

MARGETSON *v.* WRIGHT, E. T. 1832. C. P. 8 *Bing.* 454.

A splint is an unsoundness*.

THE defendant warranted a horse sound wind and limb at the time of the contract; the horse, at that time, had a splint on his off fore-leg, visible to the plaintiff, and from the effects of which he afterwards became lame. In an action on the warranty, the jury found that he had upon him, at the time of the sale, the seeds of unsoundness, and gave their verdict for the plaintiff.

The Court held, that the splint was an unsoundness to which the warranty extended.

II. RELATIVE TO THE CONSTRUCTION OF, AT WHAT TIME GIVEN, AND WITHIN WHAT TIME TO BE ENFORCED.

BUDD *v.* FAIRMANER, M. T. 1831. C. P. 8 *Bing.* 48; S. C. 6 *M. & P.* 74; S. C. 5 *C. & P.* 78.

The words, "a colt four years old, warranted sound," are not a warranty of the age.

ON the trial of this case, the plaintiff gave in evidence the following receipt, in the handwriting of his own servant, but under the signature of the defendant:—"Received of Mr. Budd 10*l.*, for a grey four years old colt, warranted sound in every respect." It was proved that the colt was purchased to match with another horse of

* A party selling a horse, and saying that the horse is sound to the best of his knowledge, is liable on a promise that he is so, although he adds the words, "but I will not warrant." (*Wood* v. *Smith*, T. T. 1829, N. P., 1 M. & M. 539).

Mere badness of shape is not in itself unsoundness, although afterwards, by cutting, producing unsoundness. (*Dickinson* v. *Follett*, 1833, N. P., 1 M. & Rob. 299). So, a slight disorder, as an influenza, at the time of sale of a horse, not diminishing the usefulness, and of which he ultimately recovered:—Held not to constitute a breach of warranty of soundness. (*Bolden* v. *Brogden*, 1836, N. P., 2 M. & Rob. 113). So, a horse labouring, at the time of sale, under a cough, rendering it unfit for immediate use, although not permanent:—Held not sound within the warranty. (*Coates* v. *Stephens*, 1837, N. P., 2 M. & Rob. 157). And crib-biting, where no disease or alteration of structure is produced by it:—Held no unsoundness, but a vice within a warranty of "free from vice." (*Scholefield* v. *Robb*, 1337, N. P., 2 M. & Rob. 210). But bone-spavin in the hock is unsoundness in a horse, and therefore is a breach of a warranty of soundness, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. (*Watson* v. *Denton*, H. T. 1835, N. P., 7 C. & P. 85).

Where a race-horse, which had broken down in training, was a crib-biter, and had a splint, and but for which would have been worth 500*l.*, was sold, after discussing those defects, for 90*l.*, with a warranty that it was sound wind and limb at the time of the sale; it afterwards again broke down in training, upon which the action was brought:—Held, that the proper direction to the jury was, whether the horse was, at the time of the bargain, sound wind and limb saving those manifest defects contemplated by the parties. (*Margetson* v. *Wright*, T. T. 1831, C. P., 7 Bing. 603).

the plaintiff's, and was only three years old. *Tindal*, C. J., however, was of opinion that the warranty did not extend to the age of the horse, but was confined to its condition, and nonsuited the plaintiff.

The Court held, that the receipt was only a warranty for the soundness, and not for the age, of the horse. The party giving the receipt was not liable to an action for a misrepresentation of the age, (which was only three years), unless he knew at the time that it was incorrect.

CAVE *v.* COLEMAN, M. T. 1828. K. B. 3 *M. & Ry.* 2.

The warranty may be given before the purchase is concluded.

IN the course of dealing between the buyer and seller of a horse, the seller described him as being "perfectly quiet and free from vice," and afterwards a bargain was struck, nothing being expressly said on either side about warranty.

The Court held, that the description given by the seller, before the purchase was concluded, amounted to a warranty.

STREET *v.* BLAY, E. T. 1831. K. B. 2 *B. & Ad.* 456.

A party must avail himself of a breach of warranty within a reasonable time.

THE purchaser of a horse, with warranty, had exercised an ownership over it more than was consistent with the purpose of trial, as, by selling and parting with it to another, at a profit, and subsequently re-purchased it.

The Court held, that it was no answer to the action for the original price, that the horse was in fact unsound at the time of the sale, and that the defendant had offered to return it; but the objection as to soundness, or breach of warranty, must be taken within a reasonable time.

BYWATER *v.* RICHARDSON, T. T. 1834. K. B. 3 *N. & M.* 748; S. C. 1 *Ad. & E.* 508.

A notice limiting the time is binding.

IN an action for breach of warranty of a horse—

The Court held, that a party may limit a warranty of soundness of a horse, by requiring it to be returned within a certain time; and if the purchaser fail to comply with the condition, he cannot recover the warranty, although the seller may have known of the unsoundness at the time of the sale.

LIDDARD *v.* KAIN, T. T. 1824. C. P. 9 *Moore*, 350.

A warranty is not confined to the time of the sale, but applies to the time of delivery.

IT was proved that, on the sale of a pair of horses, one of them had at the time a cough and running at the nose, and that, the purchaser refusing to take them then, the seller engaged to deliver both at the end of the fortnight "sound and free from blemish;" at the end of which time the cough of the one continued, and the other had his leg swollen and lame from a kick. In an action brought to recover the price, the jury found a verdict for the defendant.

The Court held, that the warranty did not apply to a mere unsoundness at the time of the sale, but was a continuing warranty to the end of the fortnight, and refused to disturb the verdict.

III. RELATIVE TO A RE-SALE, AND RESCISSION OF THE CONTRACT*.

IV. RELATIVE TO THE ACTION ON.

(*a*) Declaration.

Greenaway *v.* Titchmarsh, M. T. 1840. Ex. 7 *M. & W.* 221; S. C. 9 *D. P. C.* 279.

The plaintiff's agent bought a horse in the county of B., under a warranty of soundness, and some days afterwards told the defendant that the horse was unsound. On the day following, the plaintiff's attorney wrote in Middlesex, but posted in London, a letter, in which, after stating the horse to be unsound, he re-demanded the purchase-money, and gave notice that, unless the horse were taken away by a certain day, it would be sold, and an action brought for the difference of the amount of the sale and the purchase-money. The horse remained on the premises of the plaintiff's agent, and was provided by him with keep, the charge for which was paid by the plaintiff in Middlesex. The plaintiff was under terms to give material evidence of some matter in issue, arising in Middlesex.

As to the venue, payment of the horse's keep is material evidence;

The Court held, that payment of the horse's keep in Middlesex was material evidence of some matter in issue in that county.

Collins *v.* Jenkins, H. T. 1838. C. P. 4 *Bing. N. S.* 225.

In an action upon the warranty of a horse, a letter written by the plaintiff's attorney, in the county of Middlesex, to the defendant, and received by the agent of the defendant's attorney in the same county, informing him of the unsoundness, requiring the price paid to be returned, and stating that, in case of failure, instructions would be given to sell the animal by auction to the highest bidder, and, if loss ensued, an action would be brought for damages, adding, that the horse would be kept at livery, at the defendant's expense, until sold—

and a letter tending to increase the damages is material evidence.

The Court held, sufficient to fulfil the plaintiff's undertaking to give material evidence in that county where the venue had been laid, inasmuch as such letter went to increase the damages.

* In assumpsit, for the breach of warranty of soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep for such time only as would be required to sell the horse to the best advantage. (*M'Kenzie* v. *Hancock*, 1826, N. P., 1 Ry. & M. 436). If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time, till he can fairly sell it, and may recover against the seller for keeping the horse during that time. (*Ellis* v. *Chinnock*, 1835, N. P., 7 C. & P. 169).

Where the plaintiff failed to prove the warranty of the horse sold, but that, after he had returned him to the defendant, the latter said that he would keep it without prejudice, and not only rode it, but offered it for sale:—Held, that it was properly left to the jury, whether the defendant had not, by his own acts, rescinded the original contract of sale. (*Long* v. *Preston*, M. T. 1828, C. P., 2 M. & P. 262).

JONES *v.* COWLEY, T. T. 1825. K. B. 4 *B. & C.* 445; S. C. 6 *D. & R.* 538.

The declaration must agree with the warranty*.

IN assumpsit, the declaration stated that the defendant warranted a horse to be sound. The proof was, that the defendant warranted the horse to be sound everywhere, except a kick on the leg.

The Court held, that this was a qualified, and not a general warranty, and that there was a variance between the warranty proved and that stated in the declaration.

BLYTH *v.* BAMPTON, E. T. 1826. C. P. 3 *Bing.* 472.

If conditional, must be so stated in the declaration.

IN an action for breach of warranty of a horse, it appeared that the plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring plaintiff 4*l.* or 5*l.* The averment in the declaration was, that, in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound.

The Court held this a variance, (*Gaselee*, J., dissentiente), the warranty being conditional.

(*b*) PARTICULARS OF DEMAND†.

(*c*) PLEAS‡.

(*d*) EVIDENCE.

POULTON *v.* LATTIMORE, H. T. 1829. K. B. 9 *B. & C.* 259; S. C. 4 *M. & Ry.* 208.

In an action for the value of

GOODS had been sold under a warranty, and, in an action for the amount, the defence was, that they were inferior to the warranty,

* In an action on the case, for breach of an express warranty that a horse was quiet, if the declaration allege that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved. (*Gresham* v. *Postan*, M. T. 1826, N. P., 2 C. & P. 540). That which is a mere honorary engagement need not be stated. (*Guttring* v. *Lynn*, E. T. 1831, K. B., 2 B. & Ad. 232).

Declaration stating the consideration of the purchase of a horse to be, "that the buyer would give 100 guineas." Evidence that the buyer was to give "100 guineas, and 10*l.* more if the horse suited him:"—Held to be no variance. (*Cave* v. *Coleman*, M. T. 1828, K. B., 3 M. & Ry. 2). But where the plaintiff, in assumpsit, alleged that, in consideration that he would buy a quantity of copper of the defendant at a certain price, defendant undertook that it should be good, sound, substantial, and serviceable copper:—Held, that this warranty was not proved by shewing a purchase of copper sheathing at the ordinary market price, no express warranty having been given. (*Gray* v. *Cox*, E. T. 1825, K. B., 4 B. & C. 108; S. C. 1 C. & P. 184, 672).

† In an action for the breach of warranty of a horse, the Court will not order the plaintiff to give particulars of the unsoundness complained of. (*Pylie* v. *Stephen*, T. T. 1840, Ex., 8 D. P. C. 771; S. C. 6 M. & W. 813).

‡ By Reg. Gen., H. T. 4 Will. 4, in an action on a warranty, the plea of not guilty will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach.

The declaration, in an action on the warranty of a horse, stated that the defendant undertook and promised that the horse was sound and quiet in harness. The defendant only pleaded that he did not undertake and promise in manner and form, &c. The evidence was, that the defendant had said that the horse was sound and quiet in all respects:—Held, first, that the proof satisfied the allegation; and secondly, that the defendant could not, under the plea, give any evidence tending to shew that the horse was not unsound. (*Smith* v. *Parsons*, T. T. 1837, N. P., 8 C. & P. 199).

although the buyer kept and used them, and the contest upon the trial was upon the question as to the alleged inferiority.

The Court held, that to an action by the seller to recover the price of the seed, it was competent to the buyer to shew that it did not correspond with the warranty.

goods, it may be shewn they did not correspond with the warranty*.

(*e*) WITNESSES†.

(*f*) WHO TO BEGIN‡.

(*g*) DAMAGES.

CLARE *v.* MAYNARD, E. T. 1837. K. B. 1 *N. & P.* 701; S. C. 7 *C. & P.* 741.

A DECLARATION on a breach of warranty on the sale of a horse alleged, by way of special damage, that the purchaser re-sold the horse at an advanced price, and was afterwards compelled to take it back, and return the money.

On a breach of warranty the plaintiff cannot recover charges

* In an action on the warranty of a horse, letters passing between the plaintiff and defendant, in which the plaintiff writes, "You will remember that you represented the horse to me as a five-year-old," &c.; to which the defendant answers, "The horse is as I represented it,"—are sufficient evidence from which the jury may infer that a warranty was given at the time of the sale; and it is not necessary to give proof of what actually passed when the contract was made. (*Salmon* v. *Ward*, M. T. 1825, N. P., 2 C. & P. 211).

A horse was sold under a written warranty, contained in a receipt for the purchase-money, which was given to the buyer's servant. The son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself) got the receipt back from the servant by a fraudulent representation:—Held, in an action on the warranty against the father, that under such circumstances parol evidence of the contents could not be given, but that the son must be called as a witness. The son, being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—Held, that this fact did not vary the case so as to let in the parol testimony. (*Best* v. *Osborn*, H. T. 1825, N. P., 1 C. & P. 632). If a general warranty of a horse be proved by parol evidence, (the written contract for the sale not being forthcoming), the fact that the witness who proved it saw a notice served on the seller's premises requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury to say whether this formed any part of the original contract. (*Best* v. *Osborn*, T.T. 1825, N. P., 2 C. & P. 74).

† Where the defendant sold a horse with a warranty which he had received from the party of whom he purchased it:—Held, that the latter was a competent witness for him in an action on the warranty. (*Baldwin* v. *Dixon*, 1330, N. P., 2 M. & M. 59). But where, prior to 3 & 4 Will. 4, c. 42, s. 26, in an action on a warranty of soundness, (the unsoundness being a cough), the defendant called the party who had sold the horse originally to him to prove the soundness at the time of the sale to him:—Held, incompetent. (*Biss* v. *Mountain*, 1839, N. P., 2 M. & Rob. 302).

‡ In assumpsit on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound, and the defendant only pleaded that it was, upon which plea issue was joined; it was held, that the plaintiff had the right to begin. (*Osborn* v. *Thompson*, M. T. 1839, N. P., 2 M. & Rob. 255; S. C. 9 C. & P. 337).

for steps taken which do not increase the value*.

The Court held, that the plaintiff was not entitled to recover the difference between the purchase-money and the advance at which he sold it, as it was not alleged that he had expended any money, so as to increase the value of the horse in the interval.

(*h*) AMENDMENT†.

(*i*) NONSUIT.

PATTESHALL *v.* TRANTER, E. T. 1835. K. B. 4 *N. & M.* 649.

Keeping a horse several months after discovery of unsoundness no ground of nonsuit.

IN an action on a warranty on the soundness of a horse, it appeared that, shortly after the sale of the horse, with a warranty of soundness, the plaintiff had discovered that it was unsound; but that he had kept it for several months, without giving notice to the defendant, and had, during that period, given it physic, and taken other means to cure it. *Park*, J., thought that the plaintiff ought to have returned the horse within a reasonable time, and, under the circumstances, nonsuited the plaintiff.

Lord *Denman*, C. J.—We think that the case of *Fielder* v. *Starkin* (1 H. Bl. 17) is not overruled, and that this rule must, therefore, be made absolute, to set aside the nonsuit.

* Where a horse, warranted sound, turns out to be unsound, and is, after notice to the seller, re-sold by the purchaser, the latter may recover, not only the difference of price between the first and second sales, but also the keep of the horse for a reasonable time. (*Chesterman* v. *Lamb*, M. T. 1834, K. B., 4 N. & M. 195; S. C. 2 Ad. & E. 129). A. sold a picture to B., warranting it a Claude; B. sold it to J., and warranted it a Claude to him. The picture was not a Claude; and J. brought an action against B. on the warranty; B. defended the action, and J. recovered damages and costs against him. B. then brought an action against A. upon the first warranty:—Held, that B. was, in this action, entitled to recover against A. the amount of the damages and costs that B. had paid to J., and also the costs incurred by B. in defending the first action. But that, if the jury should be of opinion that the sale from B. to J. was not a real sale of the picture in the ordinary course of business, but merely a colourable sale on the usurious discount of a bill, they ought to disallow these sums. (*Pennell* v. *Woodburn*, T. T. 1835, N. P., 7 C. & P. 117).

Where the purchaser of a horse with a warranty sold it again, and, it proving unsound, defended an action brought against him, and failed:—Held, that the jury having found, that, by a reasonable examination of the horse, plaintiff might have discovered it to be unsound, and that, as the defence, therefore, was rash and improvident, he could not recover the costs incurred by him in the action against the original seller. (*Wrightup* v. *Chamberlain*, E. T. 1839, C. P., 7 Scott, 598).

A. sold a picture to B. as a Rembrandt. There was contradictory evidence, in an action on an accommodation bill given for the price, as to whether there was a warranty or only a representation. The picture was kept:—Held, that, if the jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture. (*De Sewhanberg* v. *Buchanan*, H. T. 1832, N. P., 5 C. & P. 343).

† Where a general warranty of the soundness of a horse was declared on, and a warranty, "except in one foot," was proved, the Judge allowed the declaration to be amended, the real dispute between the parties being, whether the horse was a roarer. (*Hemming* v. *Parry*, 1834, N. P., 6 C. & P. 580).

Warren.

MORRIS *v.* DIMES, T. T. 1834. K. B. 3 *N. & M.* 671.

Under the grant of a manor, a free warren does not pass *.

To an action of trespass, the defendant pleaded, "that Charles I., being seised of the locus in quo, by letters patent granted to W. Earl of Pembroke, &c., that they might have free warren, fowling, and hunting," and produced the letters patent, by which was granted "free chase and free warren in all the demesne lands, and lands holden by copy of court roll, of the manor of Rickmansworth," &c. The plea then deduced title to the free warren to J. F. and T. D., and alleged that they were seised in fee, and that by indenture (in 1818) of lease and release they granted the said free warren to R.W., N.W., and J. L., and then deduced title to defendant. To this plea the plaintiff replied, taking issue upon the release, and also pleaded non concessit. On the production of the lease and release, it appeared to be a conveyance, amongst other things, of "all the manor or lordship of Rickmansworth," &c.; "and all other rights, liberties, franchises, &c., hereditaments and appurtenants whatsoever, to the said manor and lordship belonging, or in anywise appertaining, to or with the same, or any part thereof, then or at any time theretofore usually held, used, occupied, or enjoyed, &c., or as were in and by the said deed of grant or letters patent granted and assured by the Crown to the said W. Earl of Pembroke, as appurtenant to the said manor or lordship."

The Court held, that by the letters patent, as pleaded and produced in evidence, a warren in gross was granted; but that the conveyance of 1818 conveyed only the manor, and what was appurtenant or appendant to the manor; that the warren in gross being no part or parcel of the manor, therefore did not pass by that conveyance.

Waste †.

DOE *d.* GRUBB *v.* THE EARL OF BURLINGTON, M. T. 1833. K. B. 2 *N. & M.* 534; S. C. 5 *B. & Ad.* 507.

Committing waste does not amount to a forfeiture.

THIS was an ejectment to recover possession of a farm, held by copy of court roll of the manor of Princes Risborough, in the county of Bucks. The ground upon which the lessor of the plaintiff pro-

* Grouse are not birds of warren. (*Duke of Devonshire* v. *Lodge*, T. T. 1827, K. B., 7 B. & C. 36).

† Where a tenant annexes to his farm part of the waste, it enures to the benefit of the landlord. (*Doe* d. *Harrison* v. *Murrell*, 1837, N. P., 8 C. & P. 135). Primâ facie, the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should shew acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste land, is rather evidence that it belongs to the landlord than to any private individual. If a person, within twenty years, enclose a portion of the lord's waste by the license of the lord, such person cannot be turned out of the possession of it by the lord, without some act being done from which a legal revocation of the license can be inferred. (*Doe* d. *Dunraven* v. *Williams*, 1836, N. P., 7 C. & P. 332).

ceeded was an alleged act of waste, committed by the tenant in the removal of a barn off the estate held by the tenant. The cause was first tried before Mr. Baron *Garrow*, when a verdict was found for the plaintiff; which verdict was set aside, and a new trial granted; which trial took place at the next assizes, when a verdict was found again for the plaintiff, with leave for the defendant to move to enter a verdict in his favour.

The Court held, first, no act of waste subjects a tenant to forfeiture, unless the act be injurious to the inheritance; secondly, that the question, whether the act be injurious, is not of necessity decided by the question as to the value of the estate after the act has been done; ex. gr., it may be an act which would increase the value of the estate, yet be injurious to the inheritance, as it may impair the evidence of the title; in such a case the act would be waste.

MARTIN *v.* GILHAM, M. T. 1837. Q. B. 7 *Ad. & E.* 540; S. C. 2 *N. & P.* 568.

Under a declaration for voluntary waste, permissive waste cannot be shewn.

CASE.—The declaration stated that the defendant on &c. held and enjoyed certain premises and gardens at &c., as tenant thereof to the plaintiff; and thereupon it became the duty of the defendant to use the premises in a tenant-like and proper manner, and not to commit any depredation or waste thereto during the tenancy; and although the tenancy continued, yet the defendant, not regarding his duty, but intending to injure the plaintiff during the continuance of the tenancy, wrongfully and unjustly, and in an untenantlike and improper manner, felled, cut down, damaged, rooted up, and loosened divers trees, shrubs, and plants, growing and being in and upon the said premises and gardens; and otherwise used the said premises and gardens in so untenantlike and improper a manner, that the same became, and were, and still are, greatly dilapidated, and in bad and untenantable order and condition, and greatly deteriorated in value. Plea—Not guilty. It appeared that the defendant had occupied the premises in question as tenant from year to year under the plaintiff; and it was established that the damage of which the plaintiff complained constituted properly permissive, and not voluntary waste, It was contended for the defendant, that he could not be liable in respect of permissive waste, being only a tenant from year to year; but, even if he could, yet that this declaration was not framed to meet such a charge. *Gaselee*, J., directed a verdict to be entered for the plaintiff, damages 10*l.*

The Court said, that it would cause a complete confusion of things to hold that, on a declaration for voluntary waste, as this is, evidence could be given of a permissive waste.

YOUNG *v.* SPENCER, M. T. 1829. K. B. 10 *B. & C.* 145.

The question is, whether any injury was done to the plaintiff's reversionary rights.

IN an action on the case by the owner of a house against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea—Not guilty. The jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it.

Bayley, J., thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case.

The Court held, on argument, that the plaintiff was not, at all events, entitled to a verdict; but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial.

SIMMONS *v.* NORTON, T. T. 1831. C. P. *7 Bing.* 140.

WRIT of waste. Plea—The general issue.

If trees be cut down for repairs, it must be pleaded *.

The Court held, first, ploughing old meadow land is waste; it alters the evidence of the title, and the land cannot be restored to its original state. On the plea of nul wast, evidence that such ploughing was for amelioration was properly rejected. And, secondly, cutting timber trees is also waste; and, if done for repairs, that matter must be specially pleaded to a writ of waste, and cannot be given in evidence under the general issue.

Watch-Rate †.

Watercourse ‡.

I. RELATIVE TO WHAT IS A WATERCOURSE WITHIN THE 2 WILL. 4, c. 71, AND OF THE RIGHT TO USE WATERCOURSES, p. 612.

II. RELATIVE TO WEIRS AND DAMS, p. 616.

III. RELATIVE TO WHEN IT PASSES WITH THE LAND, p. 616.

* Where the action on the case in the nature of waste was brought against seventeen defendants, two of whom suffered judgment by default, fifteen were acquitted; and, as to one of the two first, the plaintiff entered a nolle pros., and obtained damages against the other. Upon motion for a new trial, on the ground of the verdict against five of those who were acquitted not being warranted, the Court granted it as against them, leaving the verdict undisturbed as to the others. (*Price* v. *Harris*, T. T. 1834, C. P., 3 M. & Scott, 838; S. C. 10 Bing. 331).

† Under the 5 Geo. 4, c. 79, (Clifton Watching, &c., Act), those parts of the parish of Clifton made, by 16 Geo. 3, c. 33, and 43 Geo. 3, c. 14, part of the city of Bristol, are not included, and the justices of Gloucestershire have no power to enforce by distress in the latter district. (*Bartlett* v. *Watkins*, H. T. 1836, Ex., 1 M. & W. 223).

‡ By 2 Will. 4, c. 71, s. 2, it is enacted, "That no claim which may be lawfully made, at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by

IV. RELATIVE TO LEASES CONNECTED WITH, p. 617.

V. RELATIVE TO THE DESTRUCTION OF, DIVERSION AND DISTURBANCE IN THE USE OF, p. 617.

VI. RELATIVE TO THE REPAIRS, p. 618.

VII. RELATIVE TO THE ACTION CONNECTED WITH.

(*a*) DECLARATION, p. 619.

(*b*) PLEAS, AND OF THE LIMITATION OF ACTIONS, p. 619.

(*c*) EVIDENCE AND WITNESSES, p. 619.

(*d*) DAMAGES, p. 620.

(*e*) COSTS, p. 620.

VIII. RELATIVE TO INDICTMENTS, p. 621.

I. RELATIVE TO WHAT IS A WATERCOURSE WITHIN THE 2 WILL. 4, c. 71, AND OF THE RIGHT TO USE WATERCOURSES.

WRIGHT *v.* WILLIAMS, H. T. 1836. Ex. 1 *M. & W.* 77; S. C. 1 *T. & G.* 375.

A claim to empty water from a copper-mine, though impregnated

THE declaration in case, by reversioners, stated that certain closes of land belonging to the plaintiffs, together with a pool of water in one of the said closes, were in the occupation of their tenants, which pool of water had been immemorially fed by a watercourse

shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

By sect. 4, it is enacted, "That each of the respective periods of years in the statute mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

By sect. 8, it is provided, "That when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years, exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

which flowed over the said closes into the said pool of water, the water whereof was of great use to the plaintiffs and their tenants, for the purpose of irrigating and improving the soil of the said closes of land; yet the said defendants, intending to injure the said plaintiffs in their reversionary estate in the said closes of lands and pool of water, heretofore, and before the commencement of this suit, to wit, on &c., made and sunk, in certain land contiguous and near to the said closes of land of the plaintiffs, and near to the watercourse by which the pool of water was fed, certain precipitate pits, and placed and laid large quantities of iron and other metallic substances therein, and kept them therein covered with water, whereby the water became impregnated with iron; and afterwards, to wit, on &c., and on divers other days, between that time and the commencement of this suit, let off and discharged the water so impregnated with iron out of the pits into the watercourse, whereby the water of the watercourse, and also of the pool, became also impregnated with iron, and the vaults and edges of the watercourse and pool, and the bottom and edge of the pool, became covered with a noxious sediment or deposit from the settling of the iron with which the water was impregnated, by reason whereof the water so impregnated with iron overflowed, and inundated, and injured the plaintiff's lands.

with metallic substances, is a claim to a watercourse within the 2 Will. 4, c. 71.

The Court held, that a claim to empty and discharge water from a copper-mine, which had been impregnated with metallic substances, in pits sunk in the party's own soil, into the watercourse of a neighbour, is a claim to a watercourse within the 2 Will. 4, c. 71, s. 2.

MAGOR *v.* CHADWICK, H. T. 1840. Q. B. 3 *P. & D.* 367; S. C. 11 *Ad. & E.* 571.

CASE for fouling and obstructing the water of a stream used by plaintiffs for the purposes of a brewery. Pleas, first, not guilty; secondly, that the plaintiffs ought not of right to have or enjoy the benefit of the said water, nor hath the same been used to flow, nor of right ought to flow, unto or into the said buildings, brewery, and premises without interruption, fouling, or annoyance, as in the said declaration mentioned. Issue joined. It appeared that a watercourse had been originally made for the purpose of draining a mine; the working of the mine having been abandoned, the owners of the land situated at the issue of the stream from the mine had used the water for more than twenty years for the purposes of a brewery. The proprietors of the mine having recommenced working it, fouled the water so as to render it unfit for use by the brewers. At the trial, *Patteson*, J., directed the jury, that, if the twenty years' enjoyment was proved, and if they were not satisfied by the evidence adduced on the part of the defendants that a custom existed in that mining district by which a stream once used for mining purposes remained always liable to be used for the same, to find for the plaintiffs. The jury rejected the evidence of the custom, and found for the plaintiffs accordingly. On motion for a new trial, on the ground that, independently of the custom, the defendants were entitled to resume the use of the stream—

A party who has had the use of water from a mine for twenty years cannot be deprived of it.

The Court refused to disturb the verdict.

ARKWRIGHT *v.* GELL, E. T. 1839. Ex. 5 *M. & W.* 203.

But the user of water produced by artificial drainage of a mine, though for twenty years, confers no right.

IN the year 1700, certain persons had in part constructed a sough, or under-ground watercourse, called the Cromford Sough, for the purpose of draining an extensive mineral field, in the district of the wapentake of Wirksworth, in the county of Derby. By agreements with the owners of the mines, the sough was carried on and completed; and in 1738 the proprietors leased the sough for 999 years for a pecuniary consideration. When completed, the mouth of the Cromford Sough was in the village of Cromford, and near to the mouth was a stream of water, called the Bonsall Brook, into which the water of the sough discharged itself, forming a junction with the brook. After the sough had been constructed, and a constant flow of water conducted from the mines by means of it, Sir Richard Arkwright, as lessee, (through whom the plaintiffs claimed), in 1772, constructed extensive cotton-mills below the junction of the sough water with the Bonsall Brook, which mills had existed ever since, and had been turned by the united waters of the Cromford Sough and the Bonsall Brook. In 1789, Sir R. A. purchased the land on which the cotton-mills stood, and the fee-simple in the mills and manor of Cromford, including the lands through which the Cromford Sough was made; and in 1836 the present Mr. Arkwright, the lessor of the plaintiffs, became the purchaser of the reversion expectant on the determination of the lease for 999 years, and acquired the interest of a portion of those lessees, by a conveyance from some of them. About the year 1771, another sough, called the Mere Brook Sough, was commenced by a company of proprietors, not connected with the Cromford Sough, at a considerably lower level than the Cromford Sough, for the purpose of unwatering a further portion of the same mineral field, which, from its lower position, was not relieved of water by the latter sough. The defendants represented those proprietors. In 1813, by agreement with the proprietors of the Cromford Sough, the Mere Brook Sough was extended; and the water being found to flow into it, floodgates were constructed at its end, by which means, when closed, the water was thrown back upon, and discharged by, the Cromford Sough; but, when opened, the water escaped through them, and was thereby prevented from flowing to the plaintiffs' mills. In 1836, the floodgates were entirely removed, in order still further to extend the Mere Brook Sough, by which means the water was prevented from flowing down the Cromford Sough to the plaintiffs' mills. In an action by the owners of the mills, to recover damages for this diversion of the water by the defendants—

The Court held, that the plaintiffs were not entitled to recover: first, because the Cromford Sough, being an artificial watercourse, made with the sole object of unwatering the mines, and enabling their owners to get at the ores in the mineral field, the plaintiffs had acquired no right to the use of the water of it, at common law, for any longer period than the mine-owners chose to continue it in that course for their own purposes; secondly, that the plaintiffs had acquired no right to that water by virtue of the stat. 2 & 3 Will. 4, c. 71, as their enjoyment of it was not "without interruption," or "of right," as against the defendants, (the owners of the lower level of the mineral field), within the meaning of that statute.

MANNING *v.* WADSDALE, M. T. 1836. N. P. 1 *N. & P.* 172.

The right to water cattle at a pond is a mere easement.

IN case. The declaration stated that the plaintiff was an inhabitant, residing and inhabiting within the parish of St. Ives, to wit, in and upon a certain ancient messuage, with the appurtenances there situate; and, by reason of his occupation thereof, of right was entitled to the use and easement of washing and watering his cattle in a certain pond in the parish aforesaid, called "Jarwood, otherwise Darrod's Pond," and also of taking and using the water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of the said messuage, every year and at all times of the year, at his free will and pleasure; yet the defendant wrongfully encroached upon and filled up, lessened and obstructed the said pond, and also rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy; whereby the plaintiff, during &c., was and is greatly injured and disturbed in the use and enjoyment of his said right, privilege, and easement.

The Court held, that a right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for culinary and other domestic purposes, is not a profit à prendre, but a mere easement; and if it were a profit à prendre, semble, that, on general demurrer, the claim of such a right is sufficiently limited by an allegation, that the water was to be taken for the more convenient use and enjoyment of the messuage.

GREENSLADE *v.* HALLIDAY, H. T. 1830. C. P. 6 *Bing.* 379.

And an easement of a watercourse does not allow a party to do that which gives a character of permanency.

THE plaintiff claimed a prescriptive right to force back the water of a stream running through the defendant's land. The original mode of enjoying this right had, for fifty years, been by placing across the stream loose stones, and occasionally a board also; but on one occasion the plaintiff had, in addition to these, fixed the board into the bed of the stream by means of two hooked stakes. The defendant, conceiving this to give the dam a character of permanency more extensive than the legal right of the plaintiff, caused both the stakes and the board to be removed. In an action for the removal, the jury having found for the plaintiff, on motion for a new trial—

Per Cur.—A party having an easement has no right to do that which gives a character of permanency. The defendant has done more than she was authorized to do. It appears that the board had improperly been fastened down with stakes, which was a new mode of fastening it, and that the defendant ordered the whole to be removed. Now, although the defendant had a right to remove the stakes which were so improperly placed there, she clearly had no right to remove the board also. It seems to us to be like the case of a person rightfully having a brick or stone weir across a stream, which he has supported with buttresses. In such a case, a party who might have a right to remove those buttresses clearly could not justify pulling down the weir also.—Rule discharged.

II. RELATIVE TO WEIRS AND DAMS.

WILLIAMS *v.* WILCOX, T. T. 1838. Q. B. 3 *N. & P.* 606; S. C. 8 *Ad. & E.* 314.

At common law, the King cannot authorize the obstruction of a navigable river by the erection of a weir*.

TRESPASS for pulling down a weir. Plea, that it was wrongfully erected on a part of a navigable river, and impeded the navigation, wherefore the defendants removed it. Replication, that the part was distinct from the channel of the river, and that the part where the weir stood was not a navigable river. Rejoinder, that the part was a part of the river navigable, which the King's subjects had a right to navigate when the rest was choked up, and that the rest was choked up at the time when &c. In the surrejoinder, the plaintiff traversed this right.

The Court held, the King had no power, at common law, to authorize the obstruction of a navigable river by the erection of a weir; but all such weirs as were erected before Magna Charta were legalized by that and the subsequent statutes.

III. RELATIVE TO WHEN IT PASSES WITH THE LAND.

CANHAM *v.* FISK, M. T. 1831. Ex. 2 *C. & J.* 126; S. C. 2 *Tyrw.* 155.

By purchasing the land, the water passes with it.

IN case for diverting the water of a spring flowing through the close or garden of the plaintiff, whereby the plaintiff was deprived of water for his necessary uses and occasions in his dwelling-house, for watering his said close or garden, and from carrying on his trade and business as a gardener, &c. It appeared from the plaintiff's evidence that he was a market-gardener, and, in the year 1811, had purchased the garden, in respect of which he claimed the benefit of the stream of water, of Mrs. Holford, who, for many years before, had been the owner and occupier of the garden and an adjoining close, in which the spring, whence the stream flowed, rose. For more than sixty years the stream had taken its course through the garden, and continued to do so until 1825, when the defendant purchased the head of water, and subsequently diverted it. It was submitted, on the part of the defendant, that the right to the water by prescription was destroyed by the unity of possession and ownership in Mrs. Holford: *Garrow*, B., being of that opinion, nonsuited the plaintiff.

Per Cur.—The case stands thus:—The stream had run through the land now in the possession of the plaintiff for time beyond memory; it had so run ever since the plaintiff had become the purchaser; and it must be presumed that with the land was also conveyed the right to this stream of water. We will suppose this familiar case, that the owner of a house, surrounded by land of which he is also the proprietor, sells the house; he could not, by building upon that land, obstruct the lights of that house. Or suppose, even, that a grant of this land had been produced, which was silent as to

* The wrongful removal of a dam by the plaintiff gives no right to the defendants to construct it at another place; a general license would be revocable, except as to such places where it had been acted upon, and expenses incurred. (*Mason* v. *Hill*, M. T. 1833, K. B., 2 N. & M. 747; S. C. 4 B. & Ad. 1).

the water, would it be contended that the owner might cut off the water? Certainly not, because, until the reservation or occupation be shewn, the water must be presumed to have been parted with at the same time as the land.—Rule absolute.

IV. RELATIVE TO LICENSES CONNECTED WITH.

SIGGINS *v.* INGRE, T. T. 1831. C. P. 7 *Bing.* 682.

A parol license to use a water-course cannot be retracted after five years*.

THE plaintiff's father had given a parol license to the defendants to erect certain weirs and to lower the bank of a river, whereby less quantity of water ran down to the plaintiff's mill, which proving injurious, the father had, after a lapse of five years, represented it to the defendants, and required them to restore the banks to the former level, which the latter, however, refused to do—

The Court held, that such license being only a relinquishment of the use of the quantities of water which he had formerly enjoyed, and not a transfer of any right or interest, and in consequence of which the defendants had incurred expense in doing the act to which the consent was given, it could not be retracted, and that no action was maintainable for the refusal to reinstate the premises, or for continuance of the bank.

V. RELATIVE TO THE DESTRUCTION OF, DIVERSION, AND DISTURBANCE IN THE USE OF.

HALL *v.* SWIFT, E. T. 1838. C. P. 4 *Bing. N. S.* 381; S. C. 6 *Scott*, 167.

Right to water-course not destroyed by a short interval of interruption†.

THE declaration alleged that the plaintiff, before and at the time of committing the grievances by the defendant hereinafter mentioned, was, and from thence hitherto had been, and still is, seised in his demesne as of fee of and in certain lands and premises, with the appurtenants, situate in the county of S., and by reason thereof, long before

* A verbal license is not sufficient to confer an easement of having a drain in the land of another to convey water, and such license may be revoked, though it has been acted upon. (*Cocker* v. *Cowper*, M. T. 1834, Ex., 1 C., M. & R. 418).

† If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of the adjoining land on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation that, though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. (*Frankum* v. *Lord Falmouth*, 1834, N. P., 6 C. & P. 529).

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it closed that the owner of the land adjoining the ditch would not be justified in re-opening the communication, although it may appear that the communication between the ditch and the stream was ancient. If the owner of the water-mill, worked by a ground-shot wheel at a low head of water, alter the wheel to a breast-shot wheel, which requires a high head of water, and after that for twenty years and more discontinue the use of the breast-shot wheel, and resume the use of the ground-shot wheel, his discontinuance will cause the mill-

and at the time of the committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which, during all that time, of right ought to have run and flowed, and still of right ought to run and flow, into and upon the said lands and premises of plaintiff, for supplying of the same with water, and for the irrigating and watering of the said lands and premises, and for the benefit and improvement of the soil thereof, and for the use of the plaintiff in his trade and business of a currier, and otherwise, and of the cattle of the plaintiff depasturing in the said lands and premises, &c. Averment, that the defendant had wrongfully obstructed and diverted the stream above the plaintiff's premises, to the injury &c. Pleas, first, not guilty; secondly, a denial of the plaintiff's right. The acts imputed in the declaration were proved at the trial. But it also appeared that, after the acts, for which the action was brought, had been done, the plaintiff had made some alterations in the course of the water above his own grounds. It also appeared that, many years ago, the water had flowed to and through the plaintiff's lands, as he alleged; but that, twenty-two years since, an interruption had occurred, and the stream did not flow as formerly. The interruption continued for about three years, and consequently the right claimed by the plaintiff existed in its uninterrupted or ancient state for only nineteen years. The verdict passed for the plaintiff.

The Court held, 1st, that such right was not lost by the plaintiff making certain alterations in the course above his own land, it not appearing that any right of the defendant was interfered with or injured by such alteration; 2ndly, that the right was not lost by an interruption in the ancient course of the stream, being that to which the plaintiff was entitled, which interruption was continued to a period within twenty years.

VI. RELATIVE TO THE REPAIRS*.

VII. RELATIVE TO THE ACTION CONNECTED WITH†.

owner to lose his right to the higher head of water. If a defendant in one plea claim to have water flow from a mill-stream to a ditch all times, and in another plea claim the right only at the time of flushes, and the jury find the right in his favour at all times, the Judge will discharge the jury as to the claim at the time of flushes. If, in an action against two for diverting water from a mill, it appear that, on one day, both defendants cut a trench in the bank of the mill-stream, alleging that they had a right to do so, and that, the trench being filled up, one of the defendants re-opened it, it will be for the jury to say whether both defendants did not concur in the re-opening of the trench. (*Drewett* v. *Sheard*, 1836, N. P., 7 C. & P. 465).

* In case by a reversioner for non-repair of a watercourse, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable in an action. (*Egremont* v. *Pulman*, 1829, N. P., 1 M. & M. 404).

† By 2 Will. 4, c. 71, s. 5, it is enacted, "That in all actions upon the case and other pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such

(*a*) Declaration*.

(*b*) Pleas, and of the limitation of actions†.

(*c*) Evidence‡ and witnesses.

Adeane *v.* Mortlock, H. T. 1839. C. P. 5 *Bing. N. S.* 236.

In case.—The third and fourth counts of the declaration alleged a right of way out of the plaintiff's land, unto and over part of a

A tenant in possession of

allegation; and that in all pleading to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter in the statute mentioned, or any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

* If a party who has a right to the use of running water as an owner of adjoining lands has appropriated it, and by his declaration claim the right to it as the owner of a mill not twenty years old, this is bad, and the Judge, at the trial, will not allow it to be amended; and even if the jury find the plaintiff's right specially, and it be indorsed on the postea, under the stat. 3 & 4 Will. 4, c. 42, s. 24, the Court above will not give judgment for the plaintiff on that finding, because, if the plaintiff had stated his right properly, the defendant might have pleaded differently. (*Frankum* v. *Earl Falmouth*, 1834, N. P., 6 C. & P. 529).

† In pleading the enjoyment of such a right for forty years, it is correct to state it "for the full period of forty years next before the commencement of the suit." Where an enjoyment of a right for the period of forty years is alleged in a plea, it is no sufficient answer to say that there is an outstanding tenancy for life, without shewing that the reversion is in the person who sets up that tenancy; because, although, in the computation of the twenty years' prescription, under the 2 Will. 4, c. 71, s. 7, the term of the tenant for life is absolutely included; in the computation of the forty years, under sect. 8, it is only excluded conditionally, upon the resistance to the claim by the reversioner within three years after the tenant for life. (*Wright* v. *Williams*, H. T. 1836, Ex., 1 M. & W. 77; S. C. 1 T. & G. 375). In an action on the case against a canal company for obstructing plaintiff's water, alleging acts of commission and omission, whereby plaintiff was deprived of water for his works, and it appeared that, during several previous years, injury had been sustained by those acts, but that such damage had from time to time wholly ceased; and the canal act contained a clause limiting actions for any thing done in pursuance thereof to six calendar months next after the fact committed, unless there were a continuation:—Held, that, for the damage sustained within six calendar months next before the action brought, the plaintiff was entitled to recover, but not for that which had ceased previous to the period of limitation; the words "continuation of damage" must be deemed an uninterrupted unintermitting damage. (*Blakemore* v. *Glamorganshire Canal Company*, H. T. 1829, Ex., 3 Y. & J. 60).

‡ In an action for breaking flood-gates, the defendant justified as the lessee of a mill, which he held of the Bishop of W. For the defendant, old leases of the mill, granted by the Bishop of W., were produced from the Bishop's registry, and read in evidence; and it was proposed, on the part of the defendant, to put in an old map of the place in question, also brought from the Bishop of W.'s registry:—Held, that the map was not admissible in evidence. (*Wakeman* v. *West*, 1836, N. P., 7 C. & P. 479). In an action for breaking the plaintiff's close, and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing, he

part of a meadow is a competent witness to prove the obstruction.

certain road, then into the defendant's land, unto certain sluices or staunches erected and being in and upon the land of the defendant, for the purpose of repairing one of the sluices or staunches mentioned in the declaration. The defendant, by his plea, traversed the right of way claimed in these counts, and thereupon issue was joined. The plaintiff produced, for the purpose of proving the obstruction, a person named Crisford, who was tenant in possession. The witness was objected to as incompetent, having, as it was alleged, a direct interest in the event of the suit. The objection was overruled, and the evidence was received on the authority of *Doddington* v. *Hudson*, 1 Bing. 257, where, in an action on the case by a reversioner for an injury done to the inheritance, the tenant in possession was held to be a competent witness to prove the nature and extent of the injury, as the verdict could not be given in evidence either for or against him, and as no benefit was to result to him from his own testimony.

The Court held, that a tenant in possession of part of the meadow ground in question was competent as a witness to support the plaintiff's case; and semble, that it was not necessary to indorse his name on the record, under the 3 & 4 Will. 4, c. 42, s. 27.

(*d*) Damages.

Mason *v.* Hill, M. T. 1833. K. B. 2 *N. & M.* 747; S. C. 5 *B. & Ad.* 1.

The plaintiff's right to damages is not limited to the immediate injury arising from a diversion.

The plaintiff's predecessors had, for twenty years before 1818, appropriated the water of a stream and of certain springs in their lands to the purpose of irrigating the land and watering of cattle; and in 1818, upon the erection of a mill by the defendants, had given a parol license to erect a dam, and take the water from a certain point, which afterwards returned into the plaintiff's land at a spot above, where he had erected a mill, to the use of which he subsequently applied all the surplus water from the springs and stream, and that which was returned by the defendants. In 1829, the plaintiff removed the dam, and the defendants erected one lower down, and diverted at times the whole water; at others, a part, and returned that part into the stream in a heated state.

The Court held, that the plaintiff was entitled to recover damages for the diversion of the surplus water, as also for that which originally proceeded from the springs, and was collected in reservoirs before passing into the stream.

(*e*) Costs.

Wilson *v.* River Dun Company, E. T. 1839. Ex. 7 *D. P. C.* 369; S. C. 5 *M. & W.* 89.

Where a statute gives treble

An act of Parliament, creating a company, gave them treble costs in all actions brought against them for anything done in pursuance

pulled it down. Evidence may be given of what a former tenant said as to asking permission to have the water, as this is an act done, and may be proof of an exercise of a right by one side, and an acquiescence in it by the other. (*Wakeman* v. *West*, 1837, N. P., 8 C. & P. 105).

of the act, where they obtained a verdict. The declaration contained five counts. The first was for widening, deepening, and enlarging above the works of the plaintiff divers sluices, cuts, and watercourses, and thereby diverting the water from the plaintiff's works. The second was for diverting and turning the water of the stream away from the plaintiff's works. The third charged the defendants with omitting to repair a certain lock and flood-gate, and, through the defects of these, suffering and permitting the water to escape. The fourth alleged an injury to the plaintiff, by reason of the defendants having wrongfully raised the height of a certain weir, and thereby penned back and obstructed the usual flow of the water to the plaintiff's works. The fifth count charged generally the obstructing and penning back the water, without stating by what means. The defendants pleaded, first, the general issue to the whole declaration, by virtue of the stat. 6 Geo. 2, c. 9, s. 29, (local and personal public), and also several special pleas. The defendants had a general verdict on the plea of not guilty under the statute, and the plaintiff on some special pleas.

costs, the defendant is entitled to them if he has a verdict on the plea of not guilty as to some of the counts in the declaration*.

The Court held, first, that the defendants were entitled to treble costs on some of the counts only; and, secondly, that the correct mode of ascertaining those treble costs was, first to tax the defendants' costs, and then treble them on those counts on which they were entitled, and to tax the plaintiff's costs, and deduct them from the gross amount of the defendants'.

VIII. RELATIVE TO INDICTMENTS.

Rex *v.* Trafford, H. T. 1831. K. B. 1 *B. & Ad.* 874.

This was an indictment for a nuisance. It charged that a navigable river was made by the late Duke of Bridgewater, under the authority of an act of Parliament, passing over the river Mersey by means of what is called an aqueduct near to the point of junction of that river with the brook, called Chorlton Brook; that this canal has been used by all the King's subjects, with their barges, &c., upon payment of a certain reasonable toll; and that since the making of the canal the defendants had wrongfully erected and continued divers mounds and embankments near to the ancient banks of the river Mersey, and the brook called Chorlton Brook, that is to say, in parts thereof near to the aqueduct at Stratford, whereby divers large quantities of water had at divers times been wrongfully and injuriously made to flow and lodge into, upon, and against this aqueduct, and the sides and foundations thereof, and the sides and foundations of this canal adjacent to the said aqueduct, which on those several occasions ought to have flowed and crossed, and, but for the mounds and embankments, would have flowed and crossed by other ways, that is to say, over parts of the banks of the river Mersey and Chorlton Brook, whereby the said aqueduct and the sides

To change the ordinary course of a watercourse to the injury of others is indictable.

* Where, in an action on the case, a defendant succeeds on one of the several issues which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff, upon the plea of "not guilty," without damages. (*Frankum* v. *Earl Falmouth*, T. T. 1835, K. B., 4 D. P. C. 65).

and foundations thereof, and of the said canal adjoining to the said aqueduct respectively, have been injured, and have been, and still are, placed in imminent danger of being broken down and destroyed, to the great damage of the aqueduct and canal, and to the great terror, imminent danger, damage, and common nuisance of all persons using and navigating upon the canal, and of the inhabitants and occupiers of the lands adjacent to the aqueduct.

Per Cur.—It appears that, at the making of the canal, there was a sufficient provision for carrying off the flood-water in the course which it had formerly taken by the erection of the three arches; and that those three arches would have continued to be sufficient, notwithstanding an increase of water by the improved drainage of the country above, if the ancient course and outlets of the flood-water had not been obstructed by the defendants. Now, it has long been established, that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the erection and continuance of these fenders cannot be justified.

Watermen.

TISDELL *v.* COMBE, H. T. 1838. Q. B. 3 *N. & P.* 29.

Steam-boats are within the Watermen's Act (7 & 8 Geo. 4, c. 65).

THE Court held, that, the mayor and aldermen being enabled by 7 & 8 Geo. 4, c. 15, s. 57 (Watermen's Act), to make bye-laws, &c. for the regulation of boats, vessels, and other craft to be rowed or worked, steam-boats are within the meaning of the act.

Way *.

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* See the 2 & 3 Will. 4, c. 71; abridged, ante, tit. *Watercourse*, p. 611.

VI. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) When and by whom maintainable, p. 629.
(*b*) Pleas, p. 629.
(*c*) New assignment, p. 629.
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(*h*) Costs, p. 635.
(*i*) New trial, p. 636.

I. RELATIVE TO THE DEDICATION AND RIGHT OF.

Barraclough *v.* Johnson, E. T. 1838. Q. B. 3 *N. & P.* 233.

To constitute a dedication user alone, without an intention on the part of the land-owner, is not sufficient*.

In trespass.—The defendants claimed a carriage-way over the locus in quo. A user by the public with carts, for thirty years, was proved; but the plaintiffs put in a document, signed in 1795 by thirteen inhabitants of the township, twelve of whom were dead. The survivor stated that it was signed at a meeting of the township called to resist a claim made upon them to repair the road. It stated that the lane was private property, and only subject to a public foot and bridle-way. This evidence was objected to, but received. The plaintiffs then proved that in 1814 the trustee of the then owner of their estate made a verbal agreement with a colliery company, called the Thorncliffe Colliery Company, and the surveyor of the roads, to allow them the use of the road, the company to pay 5*s.* a year, and to supply cinders for the repair of the road, which the inhabitants of the township were to fetch and spread. This money was paid by the company until 1832, and the township found cinders also during a part of the time. Since then no one passed who did not lay cinders on the road. Upon this evidence, *Patteson*, J., told the jury, though the user by the public was evidence of a dedication by the owner of the soil, yet that, unless they thought that he intended in 1814 actually to dedicate it to the public, the bargain being broken, he was at liberty to resume it. The jury found a verdict for the plaintiffs.

The Court held, that although long user of a road affords evidence of a dedication to the public, yet, as such dedication is not

* By a local act of Parliament, and a lease made in pursuance thereof, A. grants to B. lands, with liberty to lay waggon-ways for the carriage of coals, for the term of sixty years, and such further term as B., his executors, &c., should work certain coal-mines; proviso (both in the act and the lease), that, if B. cease to work the mines, or fail in any one year to carry a certain quantity of coals to a depository called C., A. may re-enter. By a subsequent act the quantity to be carried is increased; proviso, that if B. do not yearly carry such increased quantity to C., "or to some other place near thereto to be used as a depository for coals instead thereof," A. may re-enter. By the last proviso the first is virtually repealed; and B., carrying the increased quantity to a depository near to C., is excused from carrying coals to C. (*Doe* d. *Bywater* v. *Brandling*, H. T. 1828, K. B., 7 B. & C. 643; S. C. 1 M. & Ry. 600).

complete without an intention on the part of the landowner to dedicate it, the origin of the user may be shewn to rebut the inference of the dedication; and it may be shewn there was only a license proceeding from express agreement and bargain.

MARQUIS OF STAFFORD *v.* COYNEY, T. T. 1827. K. B. 7 *B. & C.* 257.

There may be a partial dedication to the public*.

THE owner of lands had, on the making a new road over his property, given his consent thereto, on condition of its not being used by coal-carts.

The Court held, (*Littledale*, J., dubitante), that there might be a partial dedication of a highway to the public; but that, even if by law there could not be a restriction to a public way, the grant would amount only to a license, and that afterwards using it with coal-carts would be a trespass.

SURREY CANAL COMPANY *v.* HALL, T. T. 1840. C. P. 1 *Scott, N. S.* 264; S. C. 1 *M. & G.* 382.

With respect to dedication, a company are not in a different situation to a private owner.

BY an act of Parliament passed in the year 1801, for the making of the Grand Surrey Canal, it was provided, that, where the proprietors took any land for the purpose of the canal, they should erect bridges, arches, &c., for the use of the owner or occupier of the land; and, in case of any dispute, an application was to be made to justices of peace. The company having cut and carried their canal through open lands and fields of R., over which there had been previously a foot and bridle-way, in 1810 built a swivel bridge for the use of R. and his tenants, which bridge was used by other persons, on horse and on foot, without interruption until the year 1822. At that time houses and a church were built upon the lands on each side of the bridge, and the population of the neighbourhood continued to increase until the year 1832, up to which time the company did not offer any interruption to the passage of foot-passengers, horses and carriages over the bridge. They then demanded a toll of all persons, except the tenants of R., which they continued to exact until they built a new brick-bridge in 1834, and subsequently until 1837, when the defendant claimed the right to pass over the bridge as a public bridge.

The Court held, first, that the company were in no different situation upon the question of their acquiescence in the use of the bridge by all persons for a number of years than a private owner; and that the circumstance afforded good evidence of a dedication to the public of a right of passage over the canal by means of the swivel bridge, which right existed also over the new bridge; secondly, that it was no misdirection by the Judge to tell the jury that, although the bridge might originally have been erected for the convenience of R. and his tenants, still, if there grew up in the public mind, in consequence of the company's act, an idea that they intended to confer a public right, there had been a dedication to the public, and the company could not afterwards remove the bridge.

* It seems there cannot be a conditional dedication. (*Barraclough* v. *Johnson*, E. T. 1838, Q. B., 3 N. & P. 233).

LIVETT *v.* WILSON, E. T. 1825. C. P. 3 *Bing.* 115.

A party who has used a way uninterruptedly under a deed (lost) for twenty years is entitled to a verdict.

IN trespass, the defendant pleaded a right of way granted by deed to certain persons, under whom he claimed, but which he averred to have been lost and destroyed; and the plaintiff, in his replication, traversed the right of way by grant; and it appeared at the trial that the right had been frequently contested; and *Gaselee*, J., told the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, it would be presumptive evidence of the existence of a deed; and that, if such deed had been lost, they would find for the defendant; but if they thought there had been no way granted by deed, then for the plaintiff.

Per Cur.—It appears to us that the direction to the jury was perfectly right; and if it were otherwise, it is evident that the cause must go down for a new trial. If there had been an uninterrupted usage for more than twenty years, it is clear that the jury might be warranted in presuming it to have originated in a deed; but even in such a case, a Judge would only be justified in saying, that they might presume a deed. Here, all the advantage was given to the defendant which he could possibly require, as they were told, that if they thought that he had exercised the right uninterruptedly for more than twenty years, by virtue of a deed, he would be entitled to a verdict, although such deed had been lost. Now, that appears to us to have been going quite far enough; for the learned Judge did not say, that they *must* find a deed, but merely that they *might* do so. It is the duty of a Judge, if there is strong evidence of an usage, inconsistent with the existence of a deed, to direct the jury to consider it, and decide accordingly. Here, it appears, that the property in question was originally conveyed by deed, but that the right of way was not reserved therein; and although there might have been another and subsequent deed, still there was no reservation of the way in the original; but the user by the defendant, so far from having been uninterrupted or undisputed, appears to have been constantly contested; and, after he had been some years in possession, it seems that, when he lately took some adjacent premises, he stated that his right of way could no longer be contested. That shews that he thought he had no previous right; for if he had, there would have been no occasion for him to have made use of that expression. The weight of evidence was clearly against the existence of a deed; and the essence of the issue the jury had to try was, whether the deed stated in the defendant's plea ever had existence or not; and if there had been such an instrument, it is not probable that the user of the way would have been disputed.

CODLING *v.* JOHNSON, T. T. 1829. K. B. 9 *B. & C.* 933.

As to a prescriptive right of way, it is sufficient if the jury find the immemorial right.

A RIGHT of way by prescription was claimed in respect of the occupation of a certain close. It appeared that the close was part of an open common, which had been inclosed by act of Parliament in 1774: and then the close had been allotted to the ancestor of him who claimed the right of way. But the user of the right of way by the commoners was proved to have been before 1774. The

jury found a verdict in favour of the right of way. It was then objected that this right of way, as claimed, could not have existed by prescription; but

The Court held, that it might, as the fee might have been in the lord, with a right of way for the tenants; to such of whom as took allotments the right would pass.

II. RELATIVE TO AGAINST WHOM CLAIMABLE.

Bright *v.* Walker, T. T. 1834. Ex. 4 *Tyrw.* 502.

The 2 & 3 Will. 4, c. 71, does not give a title to a right of way over lands held under a lease for lives granted by a bishop.

In an action on the case, it appeared that the way claimed was from a wharf in a close called Cliff Meadow, which adjoined the river Severn, through a meadow called Eacham Meadow, over a close called the Acre, where the obstruction took place, into a public highway. The Cliff and the Eacham Meadow were, in the year 1805, demised by the then Bishop of Worcester to a Mr. Alderman Davis for three lives, and, in the year 1809, a person of the name of Roberts, under whom the plaintiff claimed, purchased the leasehold interest in both meadows from Davis, and established a large brickwork in Cliff Meadow. He then made an opening or carriage-road out of Cliff Meadow into Eacham Meadow, and by that road carried the bricks through the piece called the Acre into the highway. At that time, the Acre, now the property of the defendant, belonged to a person named Dallon, who, in the month of April, 1811, erected a gate in the Acre to prevent Roberts from carrying bricks from the Cliff Meadow through the Acre, and locked up the gate. Roberts broke the gate down, and he, the plaintiff, continued to carry bricks without interruption until 1833, when the defendant, who had purchased Dallon's interest in the Acre, put up a gate across the road, and locked it up, and the action was brought for that obstruction. It appeared that when Roberts first purchased Davis's interest in the Eacham and Cliff Meadows, there was a road through the Acre to the Eacham Meadow, but no communication between the Eacham and the Cliff Meadow, but the road to the latter was by a place called Grimsby Stile; and the defendant contended, that the plaintiff had a right to use the road through the Acre to the Eacham Meadow only, and had no right to use it to the Cliff Meadow. The plaintiff claimed a right of way to the Cliff Meadow by uninterrupted enjoyment for more than twenty years, and obtained a verdict with 5*l.* damages; the jury finding, that there had not been any grant of a right of way by the bishop, but that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years.

The Court held, that the 2 & 3 Will. 4, c. 71, did not give a title to a right of way over lands held under a lease for lives granted by a bishop, by reason of an adverse user for twenty years during the lease, either as against the bishop, the lessee, or those claiming under the lessee.

III. RELATIVE TO THE GRANT OF, AND OF COVENANTS AND LEASES.

BOWER *v.* HILL, M. T. 1835. C. P. 2 *Bing. N. S.* 339; S. C. 2 *Scott*, 535.

The grant of a way may be presumed.

IN case for "obstructing" a way claimed by reason of the plaintiff's possession of land, but the evidence was of user only in respect of an inn and yard formerly held together with the plaintiff's land, but which had been severed for sixteen years,

The Court held, that, as the grant was to be presumed to have been made by the occupier of the inn, and who might resume it, there was no evidence for a jury in support of the plaintiff's claim, and that the nonsuit was right.

OAKLEY *v.* ADAMSON, M. T. 1831. C. P. 8 *Bing.* 356; S. C. 1 *M. & Scott*, 510.

A right of way may be inferred under a covenant that the defendant took the soil subject to the plaintiff's right of way*.

THE plaintiff claimed a right of way over the defendant's soil. It appeared that the defendant's lease granted him all ways, without exception or qualification. There was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths, &c., used in common with them; and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply.

The Court held, that it might be inferred that the defendant took the soil demised to him subject to the plaintiff's right of way.

ALLAN *v.* GOMME, E. T. 1840. Q. B. 11 *Ad. & E.* 759; S. C. 3 *P. & D.* 581.

But a way under a deed can only be used according to the user reserved.

A DEED reserved to the defendant a right of way over a yard "to the stable and loft over the same, and the space or opening under the loft, and now used as a woodhouse," and also the use of the yard "in common with the plaintiff and his tenant for the time being, it being the intent that the whole of the yard should be open and undivided as the same then was, without any other building to be erected thereon, and that the yard should be used in common by the occupiers of the plaintiff's and defendant's premises, in the same manner as the tenants thereof had been accustomed to use the same." The defendants converted the loft and the space thereunder, which had been used as a woodhouse, into a cottage.

* In an action for obstructing a way granted by a lease from the defendant to the plaintiff, the Judge will receive evidence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way granted is; but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as shewing where the way is, or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the Judge will receive parol evidence to shew which of the two the grantor meant to grant. If a way granted by a lease cannot be used, by reason of its passing over the land of third persons, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest public highway by the shortest across the grantor's land. (*Osborn* v. *Wise* E. T. 1837, N. P., 7 C. & P. 761).

The Court held, first, that the deed did not justify the defendant in using the yard after the cottage was built, for that such a user was not the accustomed user which had been reserved; secondly, that the reservation of the way to the space or opening under the loft, and now used as a woodhouse, "was to be taken as identifying the locality and confining the way to a piece of open ground generally, and not specifically to a woodhouse; but that the conversion of the open space to a cottage was an alteration of substance, and that the defendant had no right of way to the cottage.

IV. RELATIVE TO THE SUBSTITUTION OF WAYS, AND OBSTRUCTION OF*.

ADEANE *v.* MORTLOCK, H. T. 1839. C. P. 5 *Bing. N. S.* 236.

If the plaintiff be entitled to enter at one spot, the defendant has no right to substitute another.

A CLAUSE in a private inclosure act enacted, that all carriage-roads, bridle-roads, and footways, over a certain part of the land allotted to the defendant should be extinguished from the time a certain public road, fit for carriages and cattle, should be formed and put into good and sufficient repair by and at the expense of the defendant, provided that nothing contained in the act should extend, or be construed to extend, to deprive the plaintiff's father, his heirs, and assigns, or his or their agents, servants, &c., with or without horses, of the right of ingress, egress, or regress to or from the ancient cut or watercourse, to float certain meadow grounds, nor to deprive the parties above specified of the liberty of ingress, without horses, &c., to repair the said cut or watercourse. It appeared that the right of ingress at a certain point had been changed.

The Court held, that the right of ingress at a particular spot, for the purpose of repairing the watercourse, enjoyed and possessed by the plaintiff's father before and at the time of the passing of the act, was preserved by the proviso in the section, and that the defendant had no right to compel him to enter at a substituted spot.

V. RELATIVE TO THE REPAIRS†.

* If there be a public footway, with a stile across it of a certain height, no one has a right to remove the stile, and put up a gate of greater height; and the fact that gates had been previously placed across other parts will be no defence. If there be an obstruction of a public way, and any person receives a special injury from it, he may maintain an action. (*Bateman* v. *Burge*, 1834, N. P., 6 C. & P. 391).

† Where private roads, set out under an inclosure act, were improperly directed by the commissioners to be repaired by the inhabitants and occupiers in the same manner as public highways, it appeared that a road set out as a private road had been used by the public, and repaired by the parish above forty years: —Held, first, that the commissioners had no power to make such order, nor were the inhabitants bound to obey; and, secondly, that, if the inhabitants had repaired under a mistaken notion of their liability, and not on a voluntary agreement to repair the road, as one useful and convenient for the public, the defendants were entitled to be acquitted. (*Rex* v. *Edmonton*, M. T. 1830, N. P., 2 M. & M. 24).

VI. RELATIVE TO ACTIONS CONNECTED WITH. See also 2 & 3 Will. 4, c. 71, s. 5, ante, p. 618.

(*a*) By and against whom maintainable*.

(*b*) Pleas.

Reg. Gen., H. T. 4 Will. 4, K. B., C. P., and Ex.

It is ordered, "That where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

Under Reg. Gen., H. T. 4 Will. 4, the plea may be taken distributively.

Wilson *v.* Bagshaw, H. T. 1830. K. B. 5 *M. & Ry.* 448.

A plea, that A., being seized of Whiteacre and Blackacre, always used a way over Whiteacre to Blackacre, and afterwards conveyed Blackacre, "together with all ways and appurtenants whatsoever," to B.

The Court held it not a sufficient justification of an entry into Whiteacre by A. If, at the time of the conveyance, A. had no access to Blackacre by a way appurtenant in alieno solo, that circumstance should be pleaded.

Defendant must plead there was no appurtenant in alieno solo.

(*z*) New assignment.

Ellison *v.* Isles, H. T. 1840. Q. B. 11 *Ad. & E.* 665; S. C. 3 *P. & D.* 391.

Trespass quare clausum fregit.—Plea, that there was a public way over the close. New assignment, that the defendant committed trespasses extra viam. The defendant pleaded to the new assignment, that the plaintiff had obstructed the way mentioned, and that the defendant turned a little to avoid the obstruction, &c. Replication, de injuriâ. At the trial, the plaintiff admitted, in his opening, a way from E. to W., and alleged that this way was the way admitted by his new assignment; the defendant sought to establish another way from N. to S. The question then raised between the parties

If there be two ways stated in the pleadings, the defendant must specify which he intends to claim.

* A reversioner cannot maintain an action against a stranger for acts of trespass on the land unattended with any other injury to the reversion than as being committed in assertion of the claim of a right of way. (*Baxter* v. *Taylor*, M. T. 1832, K. B., 1 N. & M. 11; S. C. 4 B. & Ad. 72).

A dock company having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed, and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. (*Wiggins* v. *Boddington*, M. T. 1828, N. P., 3 C. & P. 544).

was, which of the two ways was that admitted on these pleadings. *Patteson*, J., said, that he would take it that the footway mentioned in the plea was that from east to west which the plaintiff admitted, and, consequently, that the defendant had gone out of it. Verdict accordingly for the defendant, with leave to the defendant to move for a new trial.

Per Cur.—The plaintiff contended that the way admitted by the pleadings was that from east to west, which had never been obstructed, but out of which the defendant had gone. The defendant insisted that the way admitted was that from south to north which had been obstructed. The defendant was willing to try the question as to the existence of the way from south to north, but *Patteson*, J., refused to try it unless the pleadings were amended, and such an issue raised that the jury might be sworn to try it; but the parties would not amend, and he directed a verdict to be found for the plaintiff. The real question in dispute was the existence of a public footway from south to north. The point is, by whose fault it was that question was not raised. If the defendant had pleaded the truth at once, namely, that there was a public footway across the close, even without setting out the direction of it, which he was not bound to do, which footway was obstructed, and therefore he passed as near as he could, the plaintiff might safely have denied the existence of the footway; for the defendant would not have been allowed, on that issue, to have applied his evidence to the undisputed way from east to west, which was not obstructed; but as the plea stood, merely asserting a footway generally, it is obvious, if the plaintiff had denied the way, and the defendant had chosen to apply his evidence to the undisputed way, the issue lying on him, the plaintiff must have failed. He was, therefore, compelled to new assign; indeed, the defendant did not, on the argument, complain of this, but said, the plaintiff ought to have new assigned with particularity the precise part of the close and spot where the trespass was committed. Suppose he had done so ex concessis, that spot would not have been in the line of way claimed from south to north. The defendant would have been just as liable to have misconceived the plaintiff's intention in not denying the way as he was under the new assignment as it stands. The defendant could not have been ignorant of the existence of the way from east to west, neither could he really suppose the plaintiff meant to admit on the pleadings the existence of the way from south to north, when he knew the plaintiff brought his action to dispute and try that point. He ought to have pleaded to the new assignment another public footway, which the plaintiff could have denied, without fear of being turned round on the pleadings. The plaintiff could not prove either declaration or new assignment, so as to raise the question necessary to be tried, whereas the defendant could, either in his original plea to the declaration, or in pleading to the new assignment, have raised the question without difficulty.

(*d*) Replication.

BEASLEY *v.* CLARKE, E. T. 1836. C. P. 2 *Bing. N. S.* 705.

Under a replication traversing a right of way over the closes in which &c.; secondly, that the way

IN trespass, the defendant pleaded, first, justification, under a

was used for twenty years, without interruption, by the occupiers of his farm; and lastly, that the way was used for forty years by the occupiers of the farm in question as of right, and without interruption. Replication to the second plea, that when the occupiers of the defendant's farm used the way, they used it with the leave or license, sufferance or permission, of the occupiers of the plaintiff's closes. To the last plea, denying that the occupiers of the defendant's farm had, for and during the full term of forty years and upwards, as of right, had and used the way without interruption. In his rejoinder to the replication to the second plea, the defendant traversed the leave and license. Upon the trial, the plaintiff gave evidence that a prior occupier of the defendant's farm had, upon application, obtained leave to use the way in question, and that he paid an acknowledgment for the use thus granted. A verdict being found for the plaintiff upon both issues—

ing the right to use &c., leave and license may be shewn.

The Court held, that, on a replication, traversing the use as of right, the plaintiff might give in evidence, under 2 & 3 Will. 4, c. 71, s. 8, that the way had been used by leave and license, and that an acknowledgment had been given by those to whom the use of such way had been allowed.

KINLOCK *v.* NEVILE, T. T. 1840. Ex. *6 M. & W.* 795.

TRESPASS quare clausum fregit.—Plea, general right of way over the locus in quo for the occupiers of a certain close, called Breast-field, enjoyed as of right and without interruption for twenty years before the commencement of the suit. Replication, that, prior to the commencement of the twenty years, the Trent Navigation Company, under the provisions of their act of Parliament, (23 Geo. 3, c. 48), made a haling or towing-path across the locus in quo into Breast-field; that, after the commencement of the twenty years, another haling-path was set out under the powers of the Dimham Bridge Act, (11 Geo. 4, c. 66), also across the locus in quo, and into Breast-field, and that thereupon the Trent Navigation Company abandoned their former haling-path, which thenceforth ceased to be used as such; that, before and at the commencement of the twenty years, the occupiers of Breast-field used and enjoyed as of right, and without interruption, by virtue of the provisions of the first act of Parliament, a way along the first-mentioned haling-path across the locus in quo, which right of way ceased and determined on the abandonment of that path; but from that time until the commencement of the suit, the occupiers of Breast-field, claiming right to the way as a continuation of the right they had enjoyed under the first act of Parliament, continued to use the same way; which way, and the use and enjoyment thereof along the haling-path as aforesaid, is the same way, and the same use and enjoyment thereof, as in the plea mentioned. Special demurrer.

A replication disclosing facts which shew that the defendant's user of a right of way, although as of right, and without interruption for twenty years, within the meaning of the 2 & 3 Will. 4, was not such as would, before that statute, have been sufficient to establish a prescription, is good.

The Court held, first, that the right given by the first act of Parliament to use the haling-path ceased on its abandonment; secondly, that the replication disclosed facts which shewed that the defendant's user, although as of right, and without interruption for twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2 and 5, was not such as would, before that statute, have been sufficient to establish a title by prescription, or non-existing grant; and, thirdly,

that those facts could not be given in evidence, under a traverse of the right alleged in the plea, and, therefore, that the replication was good.

(*e*) Evidence.

EDWARDS *v.* BROXON, M. T. 1831. Ex. 2 *C. & J.* 18; S. C. 2 *Tyrw.* 163.

The line stated in the plea must be proved as stated.

IN trespass, the defendant, in support of a plea of right of way, proved the right in a line not corresponding with the plea, and the plaintiff had a verdict.

The Court refused a new trial, in order to give an opportunity of amending the plea.

SIMPSON *v.* LEWTHWAITE, H. T. 1832. K. B. 3 *B. & Ad.* 226.

Under a plea of "right of way from the said land into," &c., proving a prescriptive right of way is sufficient *.

A PLEA stated that the defendant was seised in fee of land contiguous and next adjoining to one of the closes in which &c., and claimed a right of way unto, into, through, over, and along the closes in which &c., and unto and into a certain highway; and the evidence was of a right of way from the defendant's close into certain other closes, and over these unto the plaintiff's close; and it appeared also, that the plaintiff had a close immediately adjoining the defendant's, over which the latter had used a way by the plaintiff's permission.

Per Cur.—We are of opinion that it is not necessary, in a plea in which both termini are stated, to take notice of the intervening closes; this is conformable with the opinion given by the Court in two cases, *Rouse* v. *Bardin*, (1 H. Bl. 351), and *Jackson* v. *Shillito*, (1 East, 381). The question is, whether that rule is applicable to the particular case,—whether the facts of the present case are such as to take it out of the general rule. The facts of the case are, that the defendant's close does in one part adjoin the plaintiff's land. The defendant does not allege that he claims a right of way from that particular part where it adjoins the plaintiff's land, but from his land generally unto, into, over, and along the closes of the plaintiff. Another particular circumstance is, that there was a road from that part of the defendant's land which adjoined the plaintiff's to the highway, which had been used by permission. Now, it cannot be understood that a way which is claimed by prescription applies to a way that the defendant had been accustomed to use by

* The user of a way, during the occupation of tenants, does not bind the landlord, unless he was aware of it; but if the use had been for a great length of time, it may be presumed that he was aware of it. If, in an action of trespass, the defendant pleads a footway, his plea is supported by proof of a carriage-way, as a carriage-way. A gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with a reservation of the right of keeping a gate across it, to prevent cattle straying. (*Davies* v. *Stephens*, 1836, N. P., 7 C. & P. 570).

Where, upon a plea of user for twenty years, under 2 & 3 Will. 4, c. 71, it was proved that the way, during the last twenty years, had been greatly varied, and at periods wholly suspended, by agreement:—Held, that it did not extinguish, nor was it inconsistent with the right; so, the user of a substituted right. (*Payne* v. *Shedden*, 1834, N. P., 1 M. & Rob. 382).

the permission of the plaintiff. The particular circumstances are not, in our opinion, sufficient to take this case out of the general rule.

LAWSON *v.* LANGLEY, E. T. 1836. K. B. 4 *Ad. & E.* 890.

Evidence of user above forty years ago ought to be received in support of a plea of enjoyment for forty years under the 2 & 3 Will. 4, c. 71.

TRESPASS for breaking and entering plaintiff's close. Plea, that defendant was the occupier of a workshop, and that the occupiers for the time being of the said workshop, for the full period of fifty years next before the commencement of the suit, have actually and as of right, and without interruption, enjoyed, and defendant, as such occupier, still of right ought to enjoy, without interruption, a certain foot and horseway over the locus in quo. Replication, traversing the enjoyment of the right. The plaintiff, who began, offered evidence to shew that, beyond and within forty years before the commencement of the suit, the way had not been enjoyed. The evidence of the user beyond the forty years was rejected. The defendant likewise offered evidence of enjoyment of the way beyond the forty years, which was likewise rejected, under 2 & 3 Will. 4, c. 71. The plaintiff having recovered—

The Court were of opinion that the evidence ought to have been received, whatever might be its weight; that the user of the road fifty years ago might certainly afford some evidence of its condition forty years back; and, if this evidence was not received, a party might fail who could not prove a user in the thirty-ninth and fortieth years, even though he carried it back to the thirty-eighth year. They, therefore, made the rule for a new trial absolute.

TICKLE *v.* BROWN, H. T. 1836. K. B. 6 *N. & M.* 230; S. C. 4 *Ad. & E.* 369.

The non user may be shewn to be not a voluntary forbearance.

THIS was an action of trespass to the plaintiff's horse, and assault on his servant. The declaration contained four counts. Pleas, first, not guilty to the whole declaration; second, that defendant, being lawfully possessed of the close, committed the assault in defence of his possession; third, the same justification to the trespass on the horse. Replication to second plea, a right of way through the defendant's close, enjoyed as of right for forty years; the same to the third plea. Rejoinder, to the replication to the second plea, of an interruption for a year, and acquiescence in that interruption; to the replication to the third, no enjoyment as of right. Sur-rejoinders, raising an issue as to the acquiescence of the plaintiff in the interruption, and traversing the enjoyment as of right; which, upon the pleadings, were the two issues to be tried. A witness of the name of Joanna Baskerville, who was a daughter of a predecessor of the plaintiff's, was called to prove the user of the way by her father, the then occupier of the plaintiff's estate, and was asked, on cross-examination, whether a payment of a penny a year had not been made, pursuant to a parol agreement, by the occupier of the plaintiff's estate to the occupier of the defendant's estate, for passing in the way claimed as of right. It was objected, that, as that payment had reference to an agreement, it ought to have been specially pleaded, according to the provisions of sect. 5 of 2 & 3 Will. 4, c. 71. It was also objected, that, if there had been such an agreement, it would be unavailable, not being by deed in writing; and for

that position the second section of the act was relied on: and Lord *Denman,* C. J., thinking that there was weight in the objections, rejected the evidence as not admissible on either of the issues raised on the pleadings. There was also some evidence of the interruption of the right of way; but it did not clearly appear whether the parol agreement referred to was made in consequence of the interruption, or whether it was made before; but, at all events, there was a cessation, commencing in 1800, for four years. A verdict was found for the plaintiff.

The Court held, that, upon the general traverse of the enjoyment as of right, evidence might be given of a parol agreement within fifty years, that the party claiming the way should use it, on paying some acknowledgment, not as an answer to an enjoyment as of right, but as shewing that there was not, at the time when the agreement was made, any enjoyment as of right, thereby breaking the continuity of the enjoyment as of right.

Cowling *v.* Higginson, T. T. 1838. Ex. 4 *M. & W.* 245.

What kind of way the evidence establishes is a question for the jury.

In support of a plea of a way for twenty years for carriages, &c., evidence was given that the way had been used for all purposes for which it had been wanted during that time, but that coals had never been carried along it, nor had any been produced from the land in respect of which the way was claimed. The defendant's counsel not claiming to have it left as a question for the jury, whether the evidence proved a general right of way inclusive of coals, *Patteson,* J., directed the jury to find for the plaintiff, with liberty reserved to the defendant to move to enter a nonsuit.

Per Cur.—Under the plea of prescription of a way, there must be proof of user of it for all purposes as of right time out of mind, according to the usual terms in which such a plea is pleaded. It is necessary to shew, not only an user when occasion required, but an user of right, and the user for such purposes is very strong evidence (particularly if those purposes are various in their character) from which the jury may infer a general right; so, in this particular case, the user is evidence for the jury that the defendant had a right to a way for all purposes for twenty years. As to the effect of such evidence, it is unnecessary to speak. If the way is confined to one purpose, doubtless the jury would not extend it; if used for a variety of purposes, then they might be warranted in finding a way for all. You must generalise to a certain extent, and whether, in this case, to the extent of establishing a right for agricultural purposes only, is a question for the jury.—New trial granted.

(*f*) Witnesses *.

* If a right of way be pleaded for the inhabitant householders of M. to fetch water, an inhabitant householder of M. may be examined as a witness in support of this plea, under the stat. 3 & 4 Will. 4, c. 42, s. 26. (*Knight* v. *Moore,* 1835, N. P., 7 C. & P. 258). To disprove the public right of way claimed, it was proposed to call occupiers of land in T., who, in respect of those lands, contributed to the highway-rate of T.:—Held, that they were not competent witnesses, as a verdict for the defendant in this case would be evidence on the ground of reputation to charge the parish on an indictment for non-repair of this road; and that the witnesses were not competent either under the stat. 3 & 4 Will. 4, c. 42, s. 27, or the stat. 54 Geo. 4, c. 170, s. 9. (*Fowler* v. *Port,* 1837, N. P., 7 C. & P. 792).

(*g*) VERDICT.

KNIGHT *v.* WOORE, T. T. 1836. C. P. 5 *D. P. C.* 201; S. C. 3 *Bing. N. S.* 3; S. C. 3 *Scott*, 326.

The verdict may be part for the plaintiff and part for the defendant.

IN trespass for breaking and entering the plaintiff's close, and pulling down a gate, the defendant justified under a right of way to a certain river with horses and carts for water and goods. The jury found in favour of the defendant as to the right for water, and against him as to the right for goods. Upon motion to enter a verdict for the plaintiff—

Per Cur.—The question (which, it should be remembered, has not arisen upon the motion for a new trial, on the ground of the verdict being against evidence) amounts in substance to this: whether the verdict found for the defendant should not be turned against him, and this when the jury have found part of the issue affirmatively against the plaintiff. To us it appears the case is within the Rule of Hilary Term, 4 Will. 4, which orders that, where a plea (being distributive in its nature) is more extensive than is necessary, one part may be found for the plaintiff, the other for the defendant, and the verdict may be entered accordingly. Here the part as to the right of way for goods is found for the plaintiff; that as to the right of way for water is not found for him, but for the defendant. The defendant, therefore, would, in our opinion, be asking too much, if he sought to have the verdict entered for him, as the plaintiff is seeking too much by making a similar application. We should not interfere.

(*h*) COSTS. See, also, 3 & 4 Vict. c. 24; 4 & 5 Vict. c. 28, ante, Vol. 3, p. 213.

ALLENBY *v.* PROUDLOCK, M. T. 1835. K. B. 5 *N. & M.* 636.

An award, that the costs are to be taxed by the proper officer, means according to the effect of the postea *.

TRESPASS, quare clausum fregit. Pleas, first, general issue; second, liberum tenementum; third, a private right of way. The case was referred to arbitration, and it was agreed that the fourth plea should be withdrawn; the costs to be in the discretion of the arbitrator; and he was to hear and decide upon the costs, as if the fourth plea had remained on the record. The arbitrator found for the plaintiff on the first and second issues, and for the defendant on the third, and awarded that the plaintiff should pay the defendants the costs of the cause, to be taxed by the proper officer. The award then set out a road to be used by the defendant in respect of the tenement for which it was claimed, to be enjoyed by the defendant in as ample and beneficial a manner as a public highway.

The Court held, that the award of the costs of the cause to be taxed by the proper officer must be taken to mean the costs accord-

* Plea, general issue; second and third, justifying under right of way. The jury found for the defendant on the right of way:—Held, he was entitled to judgment and costs. (*Cross* v. *Johnson*, E. T. 1829, K. B., 9 B. & C. 613). In an action of trespass, the defendant justified under a right of way to bring water and goods. The jury found for the plaintiff as to the goods, for the defendant as to the water:—Held, that the defendant was entitled to the general costs of the cause, as he had substantially succeeded, and also to the costs of witnesses, whose evidence applied to both issues. (*Knight* v. *Moore*, H. T. 1837, C. P., 5 D. P. C. 487; S. C. 3 Bing. N. S. 534; S. C. 4 Scott, 360).

ing to the effect of the postea, and that the Master was right in allowing the plaintiff the costs upon the first and second issues, and the defendant the costs upon the third; but that as the arbitrator had said nothing about the costs on the fourth issue, which was withdrawn, the costs on that issue were to be allowed to neither party.

(*i*) New trial.

Tinkler *v.* Rowland, E. T. 1836. K. B. 4 *Ad. & E.* 868.

If the Judge discharge the jury from giving a verdict on one issue, a new trial will be granted.

Trespass quare clausum fregit. Pleas—first, a public carriage-way; secondly, a public bridle-way; third, a public footway; which rights were all traversed by the plaintiff in his replication. The plaintiff consented that the damages, if any, should be nominal only. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third, but could not agree as to the second, and retired. After an absence of several hours they returned, and stated that they could not agree on the second issue; and one of the jury being unwell, Lord *Denman*, C. J., took the verdict on the first and third issues, and, without the consent of the plaintiff, discharged them from giving a verdict on the second issue. On motion for a new trial—

Per Cur.—This was a material issue for settling the rights in dispute between the parties, and the plaintiff, when he assented to take nominal damages, expected all the issues to be tried. The rule, therefore, must be absolute.

Weights and Measures*.

* The 5 Geo. 4, c. 74, relating to, amended by 6 Geo. 4, c. 12.

And by 4 & 5 Will. 4, c. 49,

Sect. 1. Provisions in 5 Geo. 4, c. 74, and 6 Geo. 4, c. 12, as to models and copies of standard weights and measures, repealed.

Sect. 2. Weights and measures stamped at the Exchange declared legal, although not similar in shape to those required by recited acts.

Sect. 3. Superintending officer of Exchange may verify and stamp weights and measures of other form than those prescribed by the act 5 Geo. 4, c. 74.

Sect. 4. Heaped measure abolished after 1st of January, 1835.

Sect. 5. Copies of the imperial standards to be provided, by order of magistrates in quarter sessions, for counties in England and Wales, and by meetings of justices in Scotland.

Sect. 6. Copies to be provided by grand juries in Ireland.

Sect. 7. Judges may order copies in counties in Ireland when it has not been done by grand juries.

Sect. 8. Power of providing additional copies when requisite.

Sect. 9. Return to be made by clerks of the peace on the 1st of March, 1836.

Sect. 10. Power to magistrates of towns, &c., to provide copies of the imperial standards.

Sect. 11. Weigh-masters in Ireland to be supplied with beam and scales, and accurate copies.

Sect. 12. The stone-weight, hundred-weight, and ton.

Sect. 13. All articles to be sold by avoirdupois, except as herein stated.

Sect. 14. All weights and measures to be stamped by inspectors. Penalty for making any other measures or weights, or using any unstamped, light, or defective weights and measures.

Sect. 15. Regulation as to fair prices of commodities in Scotland.

Sect. 16. Inspectors to enter into recognizance.

Wharfage*. See tit. *Carrier*.

Well†.

TYLER *v.* BENNETT, T. T. 1836. K. B. 6 *N. & M.* 826.

As to costs, the right to take water from a well is an interest in land.

IN case, for disturbing plaintiff in the use of a well, the right being in issue—

The Court held it to be an interest in land, and the plaintiff's obtaining a nominal verdict entitled him to full costs, notwithstanding the certificate of the Judge to deprive him of costs under 43 Eliz. c. 6.

Sect. 17. Power to magistrates to inspect weights and measures.
Sect. 18. Penalty for counterfeiting stamps on weights and measures.
Sect. 19. Copies of the standard weights and measures which shall have been worn and mended, to be sent to the Exchequer to be re-verified.
Sect. 20. Officer at Exchequer to keep a register of copies verified.
Sect. 21. As to penalties in England and Ireland.
Sect. 22. Form of conviction.
Sect. 23. Appeal to next general quarter sessions of the peace.
Sect. 24. As to penalties in Scotland.
Sect. 25. Appeal in Scotland to commissioners of justiciary at Circuit Court.
Sect. 26. 4 Ann. (I) and 5 Geo. 4, c. 110, repealed, except so far as relate to duties, &c., of weigh-masters.
Sect. 27. Powers of ward inquests, &c., not to be interfered with.
Sect. 28. Rights of Founders' Company reserved.
Sect. 29. In actions, magistrates may plead the general issue.
Sect. 30. Act may be amended, &c., this session.

But see the 5 & 6 Will. 4, c. 63, which has partly repealed the 4 & 5 Will. 4, c. 49.

Any contract for the sale of goods, otherwise than by the legal mode of weighing or measuring, is illegal, and cannot be enforced. (*Tyson* v. *Thomas*, H. T. 1825, Ex., 1 M'Clel. & Y. 119).

Under the 5 & 6 Will. 4, c. 76, the power of appointing inspectors of weights and measures has devolved upon the recorders of the boroughs. (*Rex* v. *Hull*, E. T. 1838, Q. B., 3 N. & P. 595).

* By an act of Parliament, certain persons were incorporated as the Hull Dock Company, and premises (before the property of the Crown) were given to them for the purposes of the act, and they were authorized to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things, it was provided, that "all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with, the like rates of wharfage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London:"—Held, that, as the premises were only vested in the company for the purposes of the act, they had no common-law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. (*Kingston-upon-Hull Dock Company* v. *La Marche*, E. T. 1828, K. B., 8 B. & C. 42).

† In an action on the case for disturbing the plaintiff in the use of a well, by putting rubbish into it, the plaintiff will be entitled to recover, if, by means of the rubbish, the water has been shallowed, and the well rendered less convenient for use; but if the effect was to make the water temporarily muddy, that is too minute a damage to support the action. If, in an action on the case, a plaintiff, in the first count, claim the right to the use of a well, as appurtenant to "a certain dwelling-house;" and, in a second count, complain that the defendant obstructed a watercourse which the plaintiff claims as appurtenant to "a certain *other* dwelling-house," the word "other" is here not matter of description, and, therefore, it is no ground of nonsuit that both the rights claimed were appurtenant to the same house. (*Tylor* v. *Bennett*, 1836, N. P., 6 N. & P. 826).

West India Dock Company.

SELLICK *v.* SMITH, T. T. 1826. C. P. 11 *Moore*, 459.

In trover, the treasurer of the West India Dock Company is entitled to notice of action.

THE treasurer of the West India Dock Company was sued in trover for goods deposited in the company's warehouses—

The Court held, that he was entitled to the fourteen days' notice given by 39 Geo. 3, c. 69, s. 185, although he had delivered over the goods upon an indemnity, it being the act of the Company through him.

Wills, Devises, and Bequests*.

I. RELATIVE TO THE INSTRUMENT TO BE USED UNDER 1 VICT. c. 26, p. 641.

II. RELATIVE TO THE PARTIES.

(*a*) BEFORE 1 VICT. c. 26, p. 641.

(*b*) SINCE 1 VICT. c. 26, p. 642.

* By 1 Vict. c. 26, s. 2, it is enacted, "That an act, 32 Hen. 8, c. 1, intituled 'The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise two Parts of his Land;' and also an act, 34 & 35 Hen. 8, c. 5, intituled 'The Bill concerning the Explanation of Wills;' and also an act, 10 Car. 1, sess. 2, c. 2 (1), intituled 'An Act how Lands, Tenements, &c., may be disposed by Will (or otherwise), and concerning Wards and Primer Seisins;' and also so much of an act, 29 Car. 2, c. 3, intituled 'An Act for prevention of Frauds and Perjuries,' and of an act 7 Will. 3, c. 12, (1), intituled 'An Act for prevention of Frauds and Perjuries,' as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any devise thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act, 4 & 5 Ann. c. 16, s. 14, intituled 'An Act for the amendment of the Law, and the better advancement of Justice,' and of an act, 6 Ann. c. 10 (1), intituled 'An Act for the amendment of the Law, and the better advancement of Justice,' as relates to witnesses to nuncupative wills; and also so much of an act, 14 Geo. 2, c. 20, intituled 'An Act to amend the Law concerning common Recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second,' intituled 'An Act for the prevention of Frauds and Perjuries,' as relates to estates pur autre vie; and also an act, 25 Geo. 2, c. 6, intituled 'An Act for avoiding and putting an end to certain Doubts and Questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America, except so far as relates to *his Majesty's* Colonies and Plantations in America;' and also an act, 25 Geo. 2, c. 11, (1), intituled 'An Act for the avoiding and putting an end to certain Doubts and Questions relating to the attestation of Wills and Codicils concerning Real Estates;' and also an act, 55 Geo. 3, c. 192, intituled 'An Act to remove certain Difficulties in the disposition of Copyhold Estates by Will,' shall be and the same are hereby repealed, except so far as the same acts, or any of them, respectively relate to any wills and estates pur autre vie to which this act does not extend." By sect. 34, it is enacted, "That this act shall not extend to any will made before the 1st of January, 1838; and that every will re-executed or re-published or revived by any codicil shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived, and that this act shall not extend to any estate pur autre vie of any person who shall die before the 1st of January, 1838. By sect. 35 it is enacted, "That this act shall not extend to Scotland."

III. RELATIVE TO THE EXECUTION OF, PUBLICATION, AND OF THE ATTESTING WITNESS.

(*a*) Before 1 Vict. c. 26, p. 642.

(*b*) Since the 1 Vict. c. 26, p. 644.

IV. RELATIVE TO THE CONSTRUCTION OF.

(*a*) Before 1 Vict. c. 26.

1. *In general*, p. 645.

2. *As to particular Expressions, and of the Preamble.*

1.—*Of the Preamble*, p. 651.

2.—"*All the rest*," *&c.*, "*all and every Son or Sons*," p. 652.

3.—"*Estate*," p. 652.

4.—"*Fixtures*," *&c.*, p. 653.

5.—"*Item*," p. 653.

6.—*Issue*: "*Without Issue*," "*Failure of Issue*," p. 654.

7.—"*Property*," p. 655.

8.—"*Purchase*," p. 655.

9.—*Tenement* "*and Buildings adjoining*," p. 656.

(*b*) Since 1 Vict. c. 26, p. 657.

V. RELATIVE TO THE PARTICULAR KIND OF ESTATE OR INTEREST CONVEYED.

(*a*) Before 1 Vict. c. 26.

1. *Fee Simple*, p. 658.

2. *Estate Tail*, p. 662.

3. *Estate for Life*, p. 665.

4. *Copyholds*, p. 668.

5. *Estate pur autre Vie*, p. 669.

6. *In Remainder*, p. 669.

7. *Executory and Conditional*, p. 670.

8. *Estate in the Residue*, p. 672.

9. *Of the Heir at Law*, p. 673.

10. *Joint Tenants and Tenants in Common*, p. 674.

11. *To Trustees*, p. 676.

12. *Of Fee-Farm Rent*, p. 681.

(*b*) Since the 1 & 2 Vict. c. 26.

1. *In general*, p. 681.

2. *Fee Simple*, p. 681.

3. *Estate Tail*, p. 682.

4. *Copyholds*, p. 682.

V. RELATIVE TO THE PARTICULAR KIND OF ESTATE OR INTEREST CONVEYED—(*continued*).

5. *Estates pur autre Vie*, p. 683.

6. *Estate—Residue*, p. 683.

7. *To Trustees and Executors*, p. 683.

8. *As to Gifts*, p. 684.

VI. RELATIVE TO, UNDER POWER OF APPOINTMENT.

(*a*) BEFORE 1 VICT. C. 26, p. 684.

(*b*) SINCE 1 VICT. C. 26, p. 685.

VII. RELATIVE TO PAROL EVIDENCE TO ADD TO, VARY, OR EXPLAIN, p. 685.

VIII. RELATIVE TO ALTERATIONS IN, SINCE THE 1 VICT. C. 26, p. 688.

IX. RELATIVE TO CODICILS.

(*a*) BEFORE 1 VICT. C. 26, p. 688.

(*b*) SINCE 1 VICT. C. 26, p. 689.

X. RELATIVE TO THE REVOCATION AND REVIVAL OF.

(*a*) BEFORE 1 VICT. C. 26, p. 689.

(*b*) SINCE 1 VICT. C. 26, p. 691.

XI. RELATIVE TO THE AVOIDANCE OF, SINCE 1 VICT. C. 26, p. 692.

XII. RELATIVE TO A DISCLAIMER, p. 692.

XIII. RELATIVE TO FRAUDULENT DEVISES, p. 693.

XIV. RELATIVE TO WHEN DEVISEES TAKE TWO DEVISES UNDER SAME WILL, p. 693.

XVI. RELATIVE TO THE REMEDIES AT LAW CONNECTED WITH.

(*a*) JURISDICTION OF COURTS OF COMMON LAW, p. 693.

(*b*) PARTIES TO ACTIONS, p. 693.

(*c*) EVIDENCE, p. 694.

(*d*) FINDING OF THE JURY, p. 695.

I. RELATIVE TO THE INSTRUMENT TO BE USED UNDER 1 Vict. c. 26.

By 1 Vict. c. 26, s. 3, it is enacted, "That it shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law or customary heir of him, or if he become entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will; or, notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto; or, notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of the will, or otherwise, could not at law have been disposed of by will if this act had not been made; or, notwithstanding that the same, in consequence of there being a custom, that a will, or a surrender to the use of a will, should continue in force for a limited time only, or any other special custom only, could not have been disposed of by will, according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested, and whether he may have become entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof, by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

All property may be disposed of by will, whether freehold, copyhold, estates pur autre vie, &c.

II. RELATIVE TO THE PARTIES TO.

(*a*) Before 1 Vict. c. 26.

Culley *v.* Doe *d.* Taylerson, E. T. 1840. Q. B. 3 *P. & D.* 539.

In 1799, A. and B., being tenants in common, B. sold his interest. The purchaser then entered into possession of the whole of the premises, and he, his heir, and the defendant, the devisee of his heir, successively continued in possession of the whole from 1799 to 1836, when the ejectment was brought. D. T., through whom the lessor of the plaintiff claimed, was heir to A.

The purchaser from a tenant in common, who takes possession of the whole premises from 1799 to

1836, may devise.

The Court held, that neither at common law, nor by virtue of 3 & 4 Will. 4, c. 27, had there been any disseisin of D. T., and that, therefore, his interest was not a mere right of entry, but was devisable by his will made in 1835; and sect. 12 of 3 & 4 Will. 4, c. 27, has relation back as far as relates to the period of the act, and makes the possession of one coparcener, joint-tenant, or tenant in common who has been in possession of the entirety, separate from the time of his coming into possession.

(*b*) Since 1 Vict. c. 26.

By 1 Vict. c. 26, an infant,

By 1 Vict. c. 26, s. 7, it is enacted that no will made by any person under twenty-one years shall be valid.

or feme covert cannot make a will.

By sect. 8 it is provided, that no will by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the act.

The statute not to apply to soldiers and mariners,

By sect. 11 it is provided, that any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estates as he might have done before the making of this act.

not to affect the 11 Geo. 4 & 1 Will. 4, c. 20.

By sect. 12 it is enacted, "That this act shall not prejudice or affect any of the provisions contained in an act 11 Geo. 4 & 1 Will. 4, c. 20, intituled 'An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the Wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers and Marines, so far as relates to their Wages, Pay, Prize-money, Bounty-money, and Allowances or other Monies payable in respect of Service in her Majesty's Navy.'"

III. RELATIVE TO THE EXECUTION OF, PUBLICATION, AND OF THE ATTESTING WITNESS.

(*a*) Before 1 Vict. c. 26.

Johnson *v.* Johnson, M. T. 1832. Ex. 1 *C. & M.* 140; S. C., 3 *Tyrw.* 73.

Before 1 Vict. c. 26, the witnesses need not see the testator sign a devise*,

On an issue directed by the Vice-Chancellor—

The Court held, that it was not necessary that a will of lands should be signed by the testator in the presence of the attesting witnesses, or that they should see the signature; and, therefore, a

* Where the testator (not an illiterate person) executed a codicil by putting his mark instead of signing:—Held, sufficient to satisfy the Statute of Frauds, (*Taylor* v. *Dening*, M. T. 1837, Q. B., 3 N. & P. 229).

Where two of the testator's witnesses did not see the testator's signature, and only one knew what the paper was:—Held, nevertheless, a sufficient attestation. (*Wright* v. *Wright*, 1830, C. P., 7 Bing. 450, n.; S. C. not S. P. 4 C. & P. 389). Where the attestation to a will of lands, purported that the will had been signed by the testator in the presence of three witnesses who, in his presence, and in the presence of each other, signed the attestation. To prove the execution of the will, one of the three witnesses was called, and he stated that he and one of the witnesses saw the testator sign the will, but that the third witness was not

will of lands, subscribed at the testator's request by three witnesses, two only of whom see his signature, is valid.

WHITE *v.* TRUSTEES OF BRITISH MUSEUM, M. T. 1829. C. P. 6 *Bing.* 310.

UPON the facts stated in a special verdict, it appeared that the attesting witnesses signed the will in the testator's presence, but two of them without knowing the nature of the instrument, and neither of them saw the testator sign.

nor know the nature of the instrument.

The Court held, nevertheless, that it was sufficiently attested within the Statute of Frauds.

DOE *d.* WILLIAMS *v.* EVANS, M. T. 1832. Ex. 1 *C. & M.* 42; S. C. 3 *Tyrw.* 56.

EJECTMENT by devisee, under the will of David Evans. The will was prepared by a dissenting minister, at the testator's request; it was written on the first page of a sheet of foolscap paper, a blank being left for the names of the executors, and ended with the words, "In witness whereof, I have hereunto set my hand and seal, this 8th day of December, 1829." On the second page was a form of attestation, but there was not any seal or signature to the will, nor any signature of witnesses. On the 30th of January, 1829, the testator informed three persons that his will was in his desk, and then took out the paper above mentioned and folded it up, so that the former parts could not be seen; he said, "This is my will," and executed (in the presence of those persons, who signed as attesting witnesses) the following codicil, without date or seal, which had before been written under the attestation on the second page: "Codicil. I, David Evans, make a codicil to the foregoing will, and thereby ordain that my wife, Ann Evans, be entitled to the sum of 200*l.* of my property, in case she should marry. David Evans." Signed and attested by three witnesses. *Alderson*, J., who tried the cause, being of opinion that the execution of the codicil was a good execution of the will, the plaintiff obtained a verdict.

And the subsequently executing and attesting a codicil referring to the foregoing will, not signed or attested, rendered the will sufficient.

The Court held, that the execution of a codicil, referring to an unexecuted will, on the same sheet of paper, according to the provisions of the Statute of Frauds, sets up the will as a will of lands.

DOE *d.* OLDNALL *v.* DEAKIN, E. T. 1828. K. B. 2 *M. & Ry.* 195; S. C. 8 *B. & C.* 22; S. C. 3 *C. & P.* 402.

IN ejectment, it appeared that Thomas Woolley died seised of the lands in question in 1800, and by his will, dated February 21st, 1798, (thirty years and twenty days before the trial), devised them to his wife for life, suffering the reversion to descend to his heir. One of

A will thirty years old proves itself*.

then present, though the signature to the attestation was of his handwriting:—Held, that this was not sufficient proof of the will, without either calling the third witness, or accounting for his absence. (*Doe* d. *Harborne* v. *Lewis*, 1836, N. P., 7 C. & P. 574).

Under 25 Geo. 2, c. 6, s. 1, a devise to an attesting witness is void, although there be three other attesting witnesses. (*Doe* d. *Taylor* v. *Mills*, 1833, N. P., 1 M. & Rob. 288).

* Where a will, dated above thirty years, was produced from one of the testator's family, although not strictly a proper custody, and never proved:—Held, that it was not necessary to produce the subscribing witness. (*Doe* v. *Pearce*, 1838, N. P., 2 M. & Rob. 240).

the attesting witnesses being shewn to be still alive, it was objected that such witness ought to have been called, the will being a nullity until the death of the testator, in 1800. *Vaughan*, B., however, was of opinion that the thirty years must be computed from the date of the will.

Lord *Tenterden*, C. J.—The principle upon which the thirty years are reckoned from the date of a deed applies to a will; and the fact of the witness being alive makes no difference.

MILLER *dem.*, MILLER *ten.*, T. T. 1835. C. P. 2 *Bing. N. S.* 66.

The attesting witness was an attorney's clerk:—Held, that inquiry at his employer's, and advertising, were sufficient to admit parol evidence.

IN ejectment, in 1815, by a devisee under a will, made in 1806, one of the attesting witnesses, a clerk in the office of the attornies who made the will, was called to prove the execution. On the trial of a writ of right in 1835, it was proved that inquiries had been made at that office, and three advertisements inserted in three London newspapers, for the purpose of finding this witness; but the party of whom the inquiries were made stated that, upon being served with a subpœna, he had discovered, on reference to his books, that the witness, in 1815, was a clerk in the office of other solicitors, which fact, however, he had not communicated.

The Court held, that due diligence had been used, in inquiring for the attesting witness, to admit evidence of his handwriting.

DOE *d.* MUDD *v.* SUCKERMORE, M. T. 1836. K. B. 5 *Ad. & E.* 703; S. C. 2 *N. & P.* 16.

Quære, whether a party skilled in the knowledge of signatures may be called to contradict an attesting witness, who swears to his own signature.

IN ejectment, to try the validity of a will, one of the attesting witnesses having sworn that the signature to the will was in his handwriting, also admitted certain other signatures then shewn to him to be his. A person skilled in the knowledge of handwriting, having never seen the attesting witness write, nor corresponded with him, examined these different signatures, and on the next day having declared that he had, by such examination, acquired a knowledge of the character of the handwriting, was asked whether he believed the attestation to be genuine; but the Judge, at the trial, refused to allow the question to be answered.

Held, by *Denman*, C. J., and *Williams*, J., that the evidence was improperly rejected; *per Patteson* and *Coleridge*, J., that it was not admissible.

STERT *v.* PLATEL, T. T. 1840. C. P. 8 *Scott*, 397.

A witness to a will, brought from abroad, is entitled to his expenses.

ON a rule to shew cause why the Master should not review his taxation, it appeared that a witness to a will was brought from abroad, being a necessary witness to prove that the party died without issue, and such fact was stated in the briefs. The Master having allowed the costs of his expenses—

The Court refused to direct him to review the taxation.

(*b*) SINCE 1 VICT. C. 26*.

The will must be signed by

BY 1 Vict. c. 26, s. 9, it is enacted, "That no will shall be valid unless it shall be in writing, and executed as hereinafter mentioned;

* The 6 & 7 Vict. c. 85, abridged, post, tit. *Witnesses*, does not repeal any provisions of the 1 Vict. c. 26.

(that is to say), it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

the testator, in the presence of, and attested by, two witnesses;

By s. 14, it is enacted, "That if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

and the will not to be void because witness incompetent.

By s. 15, it is enacted, "That if any person who shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and deductions for the payment of any debt or debts), shall be given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment in such will."

Gifts to the attesting witness to be void;

By s. 16, it is enacted, "That in case, by any will, any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

but a creditor

By. s. 17, it is enacted, "That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

or an executor may be an attesting witness.

By s. 13, it is enacted, "That every will executed in manner in the statute required shall be valid, without any other publication thereof."

The will need not be published.

IV. RELATIVE TO THE CONSTRUCTION OF.

(*a*) Before 1 Vict. c. 26.

1. In general.

King *v.* Bennett, T. T. 1838. Ex. 4 *M. & W.* 36.

The testatrix, after devising her real estate to S. K. for life, and then to G. K. for life, if he survived her, gave and devised the same to their "second son, and the heirs and assigns of such second son for ever." At the time of making the will, they had had three sons, but only one was living, which circumstance the testatrix was aware of. Afterwards, and before the death of the testatrix, a fourth son

In construing a will reference must be had to the state of things at the time of the testator's death*.

* The doctrine that the general interest must overrule the particular interest is now much modified, and the proper rule of construction held to be that technical

was born, and died, and then a fifth son was born, who outlived the testatrix.

The Court held, that a will is, in general, to be construed from the time of its date, unless circumstances or its tenor shew that the death of the testator was the time intended. The intermediate time is not to be regarded.

DOE *d.* REW *v.* LUCROFT, E. T. 1832. C. P. 8 *Bing.* 386; S. C. 1 *M. & Scott*, 573.

But the Court cannot add to the testator's intention.

TESTATOR devised certain premises in A. "in trust for such son of mine as shall first attain twenty-one, and when he shall attain such age, and for his heirs and assigns, for ever; but in case I shall depart this life without leaving a son, or leaving such none shall live to attain twenty-one, then in trust for my daughter, if she shall live to attain twenty-one, and for her heirs and assigns for ever; but should I depart this life without having issue, then to L., his heirs, and assigns for ever." The events were, that the testator died leaving a daughter, who died without issue under twenty-one.

The Court held, that they could not add to the devise over to L. the restriction in the former limitations; that issue meant such issue as should attain twenty-one; and that L. took nothing by the devise.

ANTHONY *v.* REES, M. T. 1831. Ex. 2 *C. & J.* 75; S. C. 2 *Tyrw.* 100.

A latter clause may qualify and alter a former clause.

A TESTATOR gave a freehold house called Plasbach to his granddaughter M. R., and if she died without issue to W. R., "to be freely possessed and enjoyed, his heirs, and assigns for ever;" he then made several devises and bequests to his grandchildren, and gave to his wife "the sum of 20*l.* yearly, and every year, as long as she lived, to be paid out of the freehold estate, and the lease of Penlam, by trustees hereinafter named; and at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives;" and appointed two persons "as trustees, to look in that justice should be duly administered between the said parties." M. R. died during the life of the testator, leaving no issue.

The Court held, first, that the legal estate did not vest in W. R., but passed, by implication, to the trustees, inasmuch as they could not otherwise execute the trust for payment of the annuity to the testator's widow; and, secondly, that a devise which, taken alone, would convey the legal estate, may be qualified and controlled by a subsequent devise to trustees inconsistent with that estate, if such qualification be necessary to enable the trustees to perform the duties of the trust.

words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those latter are such as to make it perfectly clear that the testator did not mean to use the technical words in their proper use. Another rule is, that every part of that which the testator meant by the words which he has used shall be carried into effect as far as the law will permit, and no further; and no part rejected, except that which the law makes it necessary to reject. (*Doe* d. *Gallini* v. *Gallini*, M. T. 1833, K. B., 2 N. & M. 619; S. C. 5 B. & Ad. 621).

DAVIES *dem.*, LOWNDES *ten.*, E. T. 1835. C. P. 1 *Bing. N. S.* 597.

THE testator devised as follows;—"I give and devise to my right and lawful heir-at-law, (for the better finding out of whom I direct advertisements to be published, &c.), his heirs, executors, &c., all my manors for ever, subject to and chargeable with the payment of my just debts, funeral charges, bonds, annuities," &c. He then gave legacies to his friends, servants, and provided for his relations on the side of his father's mother, and added—"But should it so happen, that no heir-at-law is found, I then and hereby constitute and appoint W. L. my lawful heir, on condition that he change his name to S., and I give him the estates, manors, &c., subject to and chargeable, nevertheless, with the legacies, annuities, &c., before mentioned."

And general words will be restrained and restricted by subsequent specific words.

The Court held, that the general words used by the testator are cut down and restricted, and are consequently to an heir of the blood S.

DOE *d.* NEWTON *v.* TAYLOR, H. T. 1828. K. B. 7 *B. & C.* 384.

THE testator was seised of a moiety of several estates, the whole of which had been her father's; but of which she took one part as heiress of her father, and the rest as heiress of a niece, who was her father's granddaughter. She devised in the following words: "All my moiety of and in all my late father's messuages, tenements," &c.

If the description of the will applies to the whole property it will pass.

Per Cur.—In the case of *Doe* v. *Parkins*, (5 Taunt. 82), the administrator described the property devised as "then in his occupation." That clearly pointed out certain specific lands as the subject-matter of the devise. But there is nothing to restrict the meaning of the words in question. The whole of the testatrix's property had been her late father's, although part she inherited as heir of her niece, and part as heir or devisee of her father. The description of the will applies to the whole, and we cannot say that she intended to die intestate as to any part of it.

DOE *d.* GORE *v.* LANGTON, E. T. 1831. K. B. 2 *B. & Ad.* 680.

DEVISE of all that my "manor or reputed manor of B. M., together with the mansion-house of B. *thereunto belonging*, with the park, and also all and singular my freehold messuages, lands, tenements, and hereditaments thereunto belonging, situate, &c., in the parish of B. M. and B. G."

And a clear intention to dispose of all testator possessed may pass newly purchased property.

The Court held, upon a clear intention to dispose of all that the testator then possessed, coupled with a general charge on his estate at B., that a farm purchased shortly before the date of the will, and lying intermixed with his estate at B., and treated by him as within the manor, was included, and passed under the devise.

MOSTYN *v.* CHAMPNEYS, M. T. 1834. C. P. 1 *Bing. N. S.* 341; S. C. 1 *Scott*, 293.

THE testator, seised of certain lands in tail male, with remainder over, and the ultimate reversion in fee in himself, made his will, and, after making certain bequests to his daughters, devised all his

If the words are sufficient to include a rever-

sion, and there be no express words to exclude it, it will pass.

real estates, whatsoever and wheresoever, over which he had any disposing power, to trustees, to uses, and upon trusts for certain terms for the payment of debts, annuities, and carrying into effect various other family arrangements.

The Court held, that testator's reversion in fee in the lands in question passed, under this devise, to the devisees, inasmuch as the words of the devise were sufficient to include such reversion, and no intention to exclude it was expressed in, or necessarily to be implied from, any other part of the will.

DOE *d.* DUNNING *v.* LORD CRANSTOUN, T. T. 1840. Ex. 7 *M. & W.* 1.

An incorrect description does not prevent freehold from passing*,

THE testator, by his will, devised as follows:—"Whereas it appears to me that one part of my freehold lands, namely, those lands which I hold in the parishes of W., B., and M., were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of D., as hereditary proprietors of the same; I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family; and I therefore give, bequeath, and devise the freehold lands which I hold in the three parishes aforesaid to," &c., (his next collateral heir male). All the property which the testator possessed in the parish of M. was freehold, but in the parishes of W. and B. the lands belonging to the testator were all leasehold.

The Court held, that the leasehold lands in the parishes of W. and B. were sufficiently ascertained by the will; and, therefore, though incorrectly described as being of freehold tenure, passed under the devise.

DOE *d.* EDWARDS *v.* JOHNSON, T. T. 1835. K. B. 5 *N. & M.* 281.

as a slight variation in the name of the hamlet where the land lies does not vitiate.

THE plaintiff claimed as being heir-at-law to William Edwards, deceased, and the defendants claimed under the will of William Edwards, described as of Leverington, in the Isle of Ely. By that will, he devised (inter alia) unto his friends, John Johnson, of Leverington Parson Drove, in the said Isle of Ely, farmer, and others, all and singular his messuages, lands, tenements, and hereditaments, of what tenure soever the same may be, situate, lying, and being at Leverington aforesaid, and in Wisbech St. Peter's, and Wisbech St. Mary's, &c., upon certain trusts in the will specified. By a codicil in his will, the testator, after reciting that he had contracted with the Reverend Jeremiah Jackson for the sale of four acres, twenty roods, and thirteen perches of land in Leverington, directed that, in case the sale thereof should not be completed in his lifetime, his trustees, John Johnson, of Leverington Parson Drove, and the others, should complete the same. It appeared that the parish of Leverington included a hamlet called Leverington Parson Drove, and that the testator had lands situate in Leverington and Parson Drove.

The Court held, that the land so situate passed under the will,

* Under the word tenement an advowson in gross will pass. (*Gully* v. *Bishop of Exeter*, H. T. 1827, C. P., 4 Bing. 290).

although the testator himself, in his will, described himself as of Leverington, and one of the trustees as of Leverington Parson Drove.

DOE *v.* SHOTTER, H. T. 1839. Q. B. 1 *P. & D.* 124.

Devise to A. for life, and after her death to be sold by the executors, gives them a power only.

IN ejectment, the lessee of the plaintiff claimed as the surviving executor of one William Hampton, and put in his will, dated August 7, 1800, whereby the testator gave his freehold and personal estate to his wife for life, and devised as follows:—"After the decease of my said wife Elizabeth, my will is, that my said freehold, called &c., and also all my household goods, &c., shall then be sold by my said executors, in trust, and all the money to be equally divided between all my children, or their heirs." Lord *Denman*, C. J., being of opinion, that this devise only gave a power of sale to the executors, and did not carry the estate, nonsuited the plaintiff, giving him leave to move to enter a verdict for him. On motion for that purpose—

The Court said, that it was clear the land was not devised to the executors, but a mere power of sale only was given.

MATHER *v.* THOMAS, T. T. 1833. C. P. 10 *Bing.* 44.

Under a devise of messuages, buildings, chattels real, &c., a mortgage passes.

A CASE was sent by the Vice-Chancellor for the opinion of the Court. Joseph Crewe, who was illegitimate, and died without lawful issue, was the mortgagee in fee of certain lands and houses, on which he advanced the sum of £1000. The mortgage-deeds were dated the 3rd of April and 1st of May, 1783. By will, dated the 19th of April, 1799, Crewe, the mortgagee, after charging his real and personal estate with an annuity of £20 for his servant, M. Jones, and some other legacies, devised his messuages and dwelling-houses, buildings, chattels real, ready money, securities for money, debts to him owing, and personal estate, of any nature or kind soever, save what was therein otherwise disposed of, to Mytton and Currie, their heirs, executors, administrators, and assigns, for the following purposes: that part which consisted of money to be invested in the funds or real securities; the dividends and produce of the money invested, and the rents, issues, and profits of the last-devised chattels real, to J. Capper for life, and, after his decease, the residue to be divided, or the securities subsisting on the same to be divided amongst the children of the said Capper. Upon the 24th of May, 1803, the sum of 1000*l.*, advanced by Crewe upon mortgage, was paid by the mortgagor to the surviving trustee under the will, and the latter conveyed the mortgaged premises to the mortgagor. Upon the 1st of June, 1831, C. D. was appointed, under an order of the Court of Chancery, to re-convey the said premises which were contained in the mortgage-deed of the 1st of May, 1783, under 1 Will. 4, c. 60, and the re-conveyance was accordingly made in pursuance of such order. The questions for the opinion of the Court were, whether the legal estate in the said premises, comprised in the indenture of mortgage of the 1st of May, 1783, passed under the will of J. Crewe to the said Mytton and Currie, and the survivor of them; if so, they, as a matter of course, passed under the deed of conveyance of the 24th of May, 1803, made by the surviving trustee, to the mortgagor and his heirs; secondly, if the said pre-

mises did not pass under the will of Crewe, did the legal estate pass under the re-conveyance executed under the order of the Court of Chancery.

The Court held, that, by such devise, the legal estate in the lands of which the testator was mortgagee, passed to the trustees.

GALLIERS *v.* MOSS, M. T. 1829. K. B. 9 *B. & C.* 267.

But a devise applicable to testator's own property only will not pass a mortgage.

A TESTATOR was mortgagee in fee, and devised all his freehold estates under certain limitations, which could be applicable only to property which was his own. In another part of his will, he devised all his stock in trade, cotton-mill, machinery, cupola, furnace, mineral tools, implements and utensils, ready money and securities for money, debts, personal estate and effects, upon trust, that the trustees, their heirs, &c., should dispose of the stock, get in the debts, and lay out the produce in the purchase of freehold property, upon certain trusts.

The Court held, that this devise did not pass the testator's legal estate as mortgagee.

DOE *d.* ASHWORTH *v.* BOWER, E. T. 1832. K. B. 3 *B. & Ad.* 453.

And a devise of messuages "situate at, in, or near a street called S.," does not pass houses about 400 yards off.

DEVISE "of all my tenements, &c., situate at, in, or near Snigg Hill, which I lately bought of the Duke of Norfolk, or his trustees." Testator had four houses within twenty yards of Snigg Hill, between which and Snigg Hill there were no houses, and two houses about three hundred and ninety yards off Snigg Hill, all bought of the Duke of Norfolk or his trustees. The land-tax of all these houses was likewise redeemed for one consideration, and by one and the same contract.

The Court held, that the four houses only passed, and not the other two; for where there is some land whereof all the demonstrations in a will are true, and some whereof part are true and part are false, those whereof all are true shall pass, but the latter not.

POGSON *v.* THOMAS, T. T. 1840. C. P. 6 *Bing. N. S.* 337; S. C. 8 *Scott,* 621.

So, lands treated as part of A. do not pass under a devise of A.

THE testatrix, having a manor and lands in K., B., and L., being distinct parishes, but which had been conveyed and enjoyed together, and treated as the property at K., devised "all and singular her lands, &c., situate at K. aforesaid," and, after certain specific bequests of estates, "all the rest and residue of her estate and effects wheresoever and whatsoever."

The Court held, that the lands at B. and L. did not pass under the devise.

DOE *d.* SMITH *v.* FLEMING, M. T. 1835. Ex. 2 *C., M. & R.* 638.

A devise to the younger branches of the family of A. B.

G. B. devised his estates to his daughter for life, remainder to trustees to preserve, &c., remainder to her children in tail, with a like limitation to his son; "and for and in default of such issue, he devised the said estates unto the younger branches of the family of

B. M., of &c., lawfully begotten, and to their heirs for ever, to be equally divided between them, share and share alike, and to take as tenants in common; and, in default of such issue, a similar devise to the elder branches of the family of B. W." The testator's son and daughter having both died without issue—

is void for uncertainty.

The Court held, that the limitation over failed, the devise being void for uncertainty, although it was shewn, that, at the date of the will, two daughters, who were his youngest children, were then living, and also children of two of his sons, both then dead.

DARKER *v.* DARKER, T. T. 1833. Ex. 1 *C. & M.* 850; S. C. 3 *Tyrw.* 941.

A TESTATOR devised as follows: "I give all my personal, leasehold, mortgages, and freehold estates, goods, ready money, chattels, wheresoever and whatsoever, to my brother, T. D., in trust for my nephew and nieces, J. D., A. D., M. A. D., and E. D., when the younger shall come of age; also, if my brother T. D. should have children, then his children to have equal share with my four beforementioned nephew and nieces; he, my brother T. D., to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at, and he living at free cost in the house I now occupy, keeping Sarah my servant, if they can agree, and if not, to give her one shilling per week for life."

The devisees may take in classes.

The Court held, first, that under this devise the nephew and nieces of the testator named in the will were entitled to the rents and profits of the estate when the youngest came of age; but in the event of any child or children being born to T. D., such child or children, if more than one, would be entitled to share equally with the other nephew and neices in the future rents and profits, from the time of their respective births; and that to such child or children the provision as to education and maintenance would also apply, as well as to the nephews and nieces named in the will; and, secondly, that the testator did not intend that his brother, T. D., should give up the house on the youngest niece attaining twenty-one.

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1. *As to particular Expressions, and of the Preamble.*

1.—*Of the Preamble.*

DOE *d.* KNOCKER *v.* RAVELL, 1832. Ex. 2 *C. & J.* 617; S. C. 3 *Tyrw.* 719.

AFTER the preamble, "As for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner," testatrix gave a house and premises to J. R., to come into possession at the age of eighteen, and S. R., widow, two other houses and premises (without using any express words which would pass the fee therein), to whom, also, she bequeathed the residue of her estate, which was limited, by enumeration, to personalty, and then gave S. R. the rent of the house before given to J. R., till J. R. was eighteen years old, and directed, that if he died before that time all that was left to him should descend and go to S. R.

Although the preamble indicates an intention, it cannot operate so as to pass a fee.

The Court held, that S. R. did not take an estate in fee in the

two houses and premises devised to her. An estate in fee will not pass by a will without express words, although the preamble states an intention to dispose of the whole of the testator's estate.

2.—"All the Rest," &c. "All and every Son or Sons."

WILCE *v.* WILCE, T. T. 1831. C. P. 7 *Bing.* 664.

The words, "all the rest," &c., may pass a fee.

A WILL began, "As touching my worldly property, wherewith it has pleased God to bless me in this world." The testator then devised several real estates, bequeathed sundry chattels, and charged a freehold estate, called C., with annuities, but did not otherwise mention C. He then proceeded: "All the rest of my worldly goods, bills, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son George, whom I make my whole and sole executor."

The Court held, that the residuary clause, coupled with the preamble, gave George an estate in fee in C., to the exclusion of the heir-at-law.

LANGSTON *v.* POLE, M. T. 1828. C. P. 5 *Bing.* 228.

And under the words, "all and every the son or sons," a son not named takes.

A TESTATOR devised lands to trustees in trust for his son, J. H. L., for life; remainder, to the use of the second, third, fourth, and fifth, and all and every other the son and sons of the said J. H. L., severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age or priority of birth; and with divers remainders over.

The Court held, that notwithstanding the first son was omitted in the enumeration, the first son of the testator's son, J. H. L., took under this devise an estate in tail male expectant on the death of his father.

3.—Estate.

DOE *d.* EVANS *v.* EVANS, E. T. 1839. Q. B. 1 *P. & D.* 472.

The word "estate" alone may pass real estate.

IN ejectment, it appeared that the lessor of the plaintiff claimed the lands in question as heir-at-law of his father, Daniel Evans, who had held them under a lease granted in 1798, habendum to him and his heirs during three lives. In 1821, Daniel Evans made his will, by which he gave pecuniary legacies to several of his children, but nothing to his eldest son, and concluded his will thus: "Also, I give, bequeath, and devise, unto my beloved wife, Anne Evans, all my money, securities for money, goods, chattels, *estate*, and effects, of what nature or kind soever, and wheresoever the same may or shall be at the time of my decease." He appointed her executrix of this his last will and testament, "subject to my funeral expenses, the above legacies, and all my just debts." Shortly afterwards he died. Anne Evans, the executrix, took possession of the premises, and devised to the defendant, David Evans. She died in March, 1835. *Coleridge*, J., was of opinion that the lease in question did not pass to the widow, and directed a verdict to be entered for the lessor of the plaintiff, giving the defendants leave to move to have it entered for them, if the Court should decide that the lease did pass.

Per Cur.—In this case the question was, whether the term pur autre vie passed under the word "estate." We heard the question argued with great learning on both sides, and are of opinion that, under the circumstances of the will, which are peculiar, the heir-at-law being passed over, and the lands not being devised by any other clause, taking all matters together, we think that in this case the doctrine of Lord *Hardwicke*, in *Tilley* v. *Simpson*, (2 T. R. 659, n.), and of Lord *Kenyon*, in *Jongsma* v. *Jongsma*, (1 Cox, 362), which has been very lately acted on in the cases of *Edwards* v. *Barnes*, (2 Bing. N. S. 252), and *Doe* d. *Andrew* v. *Lainchbury*, (11 East, 290), must prevail, and that all the other words in that clause are satisfied by reference to the testator's personalty; that the word "estate" must be applied to the only real property he could be supposed to have in his contemplation at that time, and therefore, that the term passed to the devisee. That makes the rule absolute; for at the trial the verdict passed in favour of the heir-at-law.—Rule absolute.

4.—"*Fixtures*," *&c.*

BIRCH *v.* DAWSON, M. T. 1834. K. B. 4 *N. & M.* 22; S. C. 2 *Ad. & E.* 37; S. C. 6 *C. & P.* 658.

Under the words "fixtures and fixed furniture," chimney glasses secured to the wall pass.

IN a will, the testator bequeathed a leasehold messuage with the grates, stoves, locks, bolts, keys, bells, and other fixtures, and fixed furniture therein, and also the household goods, furniture, plate, &c., to trustees upon trust, to permit C. S. V. to have the enjoyment of them during her life; and as to the said household goods, plate, &c., and other properties, not comprehended under the preceding terms "fixtures and fixed furniture," for E. S. V. absolutely as her own property.

The Court held, that looking-glasses, fixed over the chimney-piece and fastened in the wall by a nail on each side, and a book-case in a recess in the wall, to which it was affixed by a screw, must be considered as included under the terms "fixtures and fixed furniture," and did not pass absolutely to E. S. V.

5.—"*Item.*"

DOE *d.* ELLAM *v.* WESTLEY, M. T. 1825. K. B. 4 *B. & C.* 667; S. C. 7 *D. & R.* 112.

The word "item" means the testator is dealing with a new subject; but the words, "I also give" may connect two sentences.

THE plaintiff claimed as heir-at-law of Joseph Ellam, who being seised in fee of the premises, made his will, in which he gave several pecuniary legacies, beginning each of them with the word "item:" and in one of those beginning with the word "item," he devised a messuage to a certain person for life, and after his decease, to his son, and all thereto belonging. The testator then proceeded thus:—Item. I give and bequeath also unto Mary Westley, the youngest daughter of R. and S. Westley, that now dwells with me, all that my messuage or tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said Mary Westley all my household goods and chattels, and implements of house-

hold within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease. It also appeared that the defendant held possession of the premises as heir-at-law of Mary Westley. The jury found a verdict for the lessor of the plaintiff. On motion for a new trial—

Per Cur.—It is an old observation that the word "item" means that the testator is dealing with a new subject, and that the words following it apply to the succeeding and not the preceding matter. But the words "I also give," &c., may connect two sentences together, and the words, "all for her own disposing" might apply as well to the devise of the house as of the household goods. But it is necessary that we should be perfectly satisfied that such was the intention of the testator. We do not see any reason for inferring that the testator intended to give an estate in fee, and there should be a plain intent in order to dispossess the heir-at-law. We therefore think that our safest course is to consider the two sections as making two distinct devises, and consequently that Mary Westley took only an estate for life.—Rule refused.

6.—*Issue: "Without Issue," "Failure of Issue."*

WARD *v.* BEVIL, T. T. 1827. Ex. 1 *Y. & J.* 512.

The words "without issue" mean "death without issue generally" *.

DEVISE of fecehold to testator's natural son for his life, and in case he has issue, to inherit jointly after his decease, with a residuary clause of all his real and personal estate to such son; "but in case he die without issue, then the whole of my property to be ascertained, and (after certain legacies and annuities) the rest and residue in equal proportions to A. and B." The son had issue at the date of the will, and afterwards suffered a recovery of the freehold, and died without leaving issue.

The Court held, that, upon the construction of the residuary devise, the son took an estate tail in the freeholds, and an absolute interest in the personal estate; the words, "without issue," being now settled to mean "death without issue generally."

BRADSHAW *v.* SKILBECK, T. T. 1835. C. P. 2 *Bing. N. S.* 182.

A failure of issue means a

DEVISE of leasehold to testator's daughter for life, remainder to her two sons, or if but one, then wholly to that one for life; "and

* Where, from the terms of a will obscurely expressed, it was clear that the testator meant to give a remainder (after the life estate given to his son) to his child or children living at the time of the son's decease, or born in due time after, as tenants in common; and the will then proceeded to give an equal benefit of survivorship among the rest of the said children, if more than one, and any of them should die without leaving issue, and which would have given an estate tail to each child in his undivided share; but the will afterwards gave the estates so limited to him or them "dying without issue, unto the survivors, during," &c.: —Held, that as, by construing the will to give estates tail to the grandchildren, effect would be given to the greater part of the will, the words, "without issue" were to be taken to be words of limitation, embracing all the descendants, and not merely the children of those to whom estates had been previously given. (*Doe* d. *Gallini* v. *Gallini*, M. T. 1833, K B., 2 N. & M. 619; S. C. 5 B. & Ad. 621).

in case his daughter should not have a son or sons to attain the age of twenty-one, and of such sons dying without lawful issue," then over.

dying without issue in conformity with the devise.

The Court held, that those words did not import a gift over upon the general issue of the sons, which would be an estate tail, but a dying without issue under 21.

7.—"*Property.*"

DOE *d.* MORGAN *v.* MORGAN, E. T. 1827. K. B. 6 *B. & C.* 512.

The word "property" may pass real estate.

THE question was whether the words of a will under which the defendant was in possession of premises, respecting which the action was brought, would pass real property. The following is a copy of the will:—"January 3rd, 1822. In the name of God. Amen. I give to William as in the bond 500 during his life; to Howell Jones, apprentice, if he will make a sobor life, with the securiety of porson of the parish where he lives, the sum of 6*l.* per year; and all my property and effects of all claims I shall have, I give to my brother John Morgan, of Tull Glase, in Craybut. My mother is at liberty to give 1000*l.* of my property where she please of. This is my last will by me, David Morgan." Attested by three witnesses.

Per Cur.—This is certainly an unlettered will; but we think that no man however illiterate would use the word property without meaning thereby to pass the whole of his estate. Here the only doubt respecting the intentions of the testator arises from his subsequent gift to his mother, where the expression undoubtedly is employed in the limited signification which it has been contended we should give to it in the former part of the will; we admit that this does create some degree of uncertainty, but we do not think the uncertainty is sufficient to destroy the certainty and effect of the expression "property," as used in the first instance, or to induce us to say that the testator has not disposed of his real as well as personal estate.

8.—"*Purchase.*"

DOE *d.* MEYRICK *v.* MEYRICK, T. T. 1833. Ex. 1 *C. & M.* 820; S. C. 3 *Tyrw.* 916.

The word "purchased" may include any lands acquired in any other way than by descent.

DEVISE—"I give and devise all and every my several messuages, &c., situate in the several parishes of Llanfuhel (and others, naming them), or elsewhere, in the county of Anglesea, which I have heretofore, from time to time, purchased from different persons in the several deeds of conveyance thereof named, unto and to the use of my two sisters, Ann and Elizabeth, for their joint lives, and the life of the survivor; and, after the death of the survivor, I give and devise all that messuage, &c., called Tyddyn Lucy, in the parish of Llanfuhel, &c., to R. R., his heirs, &c.; and, as to the remainder of all those the aforesaid real estates by me heretofore purchased as aforesaid, I give and devise the same, and every part and parcel

thereof, unto and to the use and behoof of my dear brother, Thomas Meyrick, his heirs and assigns, for ever." The estate, called Tyddyn Lucy, had been purchased by the testator for a money consideration. The testator died 15th Oct. 1819, seised of Galanddu, leaving his only brother, Thomas, heir-at-law, and his sisters, Ann and Elizabeth, him surviving. Elizabeth died on the 21st of June, 1821. Thomas had entered into possession of the estate, called Galanddu, on his brother's death, and so continued till his own death, the 23rd of January, 1831. The defendant, the widow and devisee of the said Thomas, had ever since continued in possession. The question for the opinion of the Court was, whether the premises, called Galanddu, conveyed to the said William Meyrick, as above mentioned, passed by the will of the said William Meyrick to Ann Meyrick, the lessor of the plaintiff, as part of his purchased estates.

Per Cur.—The testator was owner of real property in Anglesea, part of which was the family estate, and part had been purchased by himself with money; and another part consisted of lands, which had been exchanged for a parcel of the family estate, and a small sum of money to adjust the balance. By his will, he said, "I give and devise all and every my several messuages, &c., and real estates whatsoever, situate in the several parishes of Llanfuhel, &c., or elsewhere, in the county of Anglesea, which I have heretofore, from time to time, purchased from different persons in the several deeds and conveyances therein named, and which are now vested in me in fee-simple, or in some other person or persons, to and for my use and benefit, and to and for the use and benefit of my sisters, Ann Meyrick and Elizabeth Meyrick." Did the lands, which the testator had obtained by exchange, pass under the devise to his sisters? We think, whether the word "purchased" is used in its general or legal sense, they passed. General acceptation fixes the meaning of the word, unless there are special circumstances to shew that the testator used it in a peculiar sense. There is nothing in the will to shew such peculiar use. The common meaning is, that the word "purchased" includes lands acquired in any way than by descent, and therefore the land passed, and there must be judgment for the plaintiff.

9.—*Tenements and Buildings adjoining.*

DOE *d.* PREEDY *v.* HOLTON, M. T. 1835. K. B. 5 *N. & M.* 391.

Under a devise of a tenement "and buildings adjoining" cottages adjoining pass.

DEVISE of all that messuage or tenement in Swancliffe, wherein the testator then resided, with the offices, &c., and other edifices and buildings adjoining; also, all those several closes called, &c., with their appurtenances, part of the farm and lands then in the occupation of the testator. The testator had two cottages, which were adjoining to the messuage devised, and had formed part of the premises occupied by him; but, before his death, they had been separated by a stone-wall, and let off.

The Court held, that these cottages passed under the devise of edifices adjoining, and that it was not required that they should form part of what he occupied. The evidence, as to their being adjoining did not raise any ambiguity so as to let in evidence of the declaration of the testator as to his meaning.

(*b*) Since 1 Vict. c. 26.

By 1 Vict. c. 26, s. 1, it is enacted, "That the words and expressions hereinafter mentioned, which, in their *ordinary* signification, have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say), the word 'will' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of an act, 12 Car. 2, c. 24, intituled 'An Act for taking away the Court of Wards and Liveries, and Tenures in Capite, and by Knights Service, and Purveyance, and for settling a revenue upon his Majesty in lieu thereof,' or by virtue of an act, 14 & 15 Car. 2, (I), intituled 'An Act for taking away the Court of Wards and Liveries, and Tenures in Capite, and by Knights Service,' and to any other testamentary disposition; and the words 'real estate' shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words 'personal estates' shall extend to leasehold estates, and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which, by law, devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

The 1st sect. of 1 Vict. c. 26, defines particular expressions.

By sect. 24, it is enacted, "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

A will shall be construed to operate from the death of the testator.

By sect. 29, it is enacted, "That in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without *leaving* issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate to such person or issue, or otherwise: provided that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

The words "die without issue," &c., shall be construed to mean without issue living at the death.

V. RELATIVE TO THE PARTICULAR KIND OF ESTATE OR INTEREST CONVEYED.

(*a*) Before 1 Vict. c. 26.

1. *Fee simple.*

Doe *d.* Thorn *v.* Phillips, T. T. 1832. K. B. 3 *B. & Ad.* 753.

That which is a charge on the estate passes a fee*.

Upon a devise to the testator's brother and sister, and the survivor for life, and afterwards to A., B., and C. (their children), share and share alike, they paying out of the same certain small sums to four persons on attaining twenty-one, to be paid by the testator's executrixes (being two of the devisees) or the legatees.

The Court held, that it was a charge on the devisees in respect of the estate and passed it in fee.

Sharp *v.* Sharp, T. T. 1830. C. P. 6 *Bing.* 630.

A devise in one paragraph of a freehold house, also of freehold estate, &c., may pass a fee.

A testator, by his will, after giving several pecuniary legacies for the benefit of his children, devised to his widow, in one paragraph, "the whole of his remaining property in the Bank of England or otherwise, and also a freehold house in C., also a freehold estate in C., also about sixty-one acres of freehold land, with a house and barns thereon in B., (and two other similar freeholds), also a copyhold estate in E. B., also a leasehold estate in C., with all right and title to the same."

The Court held, that the widow was entitled to an estate in fee-simple in the freeholds, and to an estate in fee, according to the custom of the manor, in the copyhold.

Permewan *v.* Mitchell, H. T. 1831. C. P. 7 *Bing.* 531.

Devise in trust to E. until twenty-one, and then to be put into possession; but if no issue, then over: E. takes an estate in fee.

A testator devised property to trustees, in trust for the use of his daughter E. E., till the age of twenty-one, at which time the trustees were to convey to E. E., and put her in possession of the lands. In the event of the death of E. E. before twenty-one, or without issue, the testator gave to T. E., on his attaining twenty-one, for his life, &c.; but if E. E. should attain twenty-one, or marry, the trustees were to hold in trust a portion for her first male issue, other part to the second, and other part to the third male issue, charged with an annuity for E. E.; and in case E. E. should die without issue male, leaving issue female, he gave to such issue female, and the heirs male of their bodies; remainder to the testator's right heirs.

The Court held, that E. E. took an absolute estate of inheritance in fee-simple in the estate in question.

* A. made a will containing these words:—"I leave and bequeath unto the said William George Lister, all the property, freehold, leasehold, and of whatever description I am possessed of, or have claim to:"—Held, that that was a bequest of A.'s estate, whatever it was; and that A., being possessed of the fee, it was a bequest of such fee, and not of an estate for life merely. (*Doe* d. *Pile* v *Wilson*, H. T. 1834, N. P., 6 C. & P. 301).

DOE *d.* HERBERT *v.* LEWIS, E. T. 1835. K. B. 4 *N. & M.* 696.

So, a devise to A. B. for life, with power to dispose of, &c., passes a fee.

A TESTATOR devised as follows: "I give and bequeath to my wife Margaret, her heirs and assigns for ever, the house in which we now live, and all the furniture therein, and all other the property of which I may die possessed, with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper."

Per Cur.—We all think it perfectly clear that the widow took an estate in fee. If we were to hold otherwise, it must be at the expense of rejecting the important words "heirs and assigns," and that, too, for the purpose of giving effect to words which are in reality not consistent with the supposition that a fee passed. The only case that excited any doubt in our minds was that in 3 Leonard, 71, pl. 108. Upon looking into that case, we think it perfectly plain that it is no authority for the plaintiff. On the contrary, the opinion of the Court on another supposed state of facts is in favour of the defendant. There is nothing there of "heirs and assigns;" but the case was this:—A., seised of lands in fee, devised them to his wife for life, and after her decease she to give the same to whom she wished. The Court there appear to have held, that, by that devise, the wife had an estate for life, with an authority to give the reversion to whom she pleased; and then they concluded by saying, "that, if an express estate for life had not been appointed to the wife, by the other words an estate in fee-simple had passed;" that is, by the words enabling her to give the same after her decease to whom she pleased. So that, according to the opinion of the Court, even *without* the words "heirs and assigns," there would, but for the express limitation to the wife for life, have been an estate in fee.

PEARCE *v.* VINCENT, E. T. 1833. Ex. 1 *C. & M.* 598; S. C. 3 *Tyrw.* 663.

And a devise to A., and if he had no issue then to B. A. had not been heard of for many years:—Held, that if A. died in testator's lifetime without issue, B. took an estate in fee.

TESTATOR devised certain real estates to his cousin, J. P., for life, and after J. P.'s decease, his real and personal estate, and all accumulations, to such of testator's next of kin, being a male, as J. P. should, by deed or will, appoint, and, in default of such appointment, to such of testator's relations of the name of P., being a male, as J. P. should adopt, for the purpose of education, if he should be living at the time of the decease of T. P.; and in case J. P. should not have adopted such male relation, or he should not be living at the time of the decease of T. P., then unto the next and nearest of kin of the testator, being a male, or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, &c.; he then gave the second and other presentations to a rectory to T. P. during his life, and his plate, books, furniture, &c., to his executors, in trust, to suffer J. P. to use the same during his life, and, after his decease, in trust for the persons who should succeed to or inherit his real estates, under and by virtue of his will; and he also gave T. P. a leasing power for a term of seven years, at the best and most improved annual rent, and without taking any fine or premium. At the death of the testator T. P. was his next of kin, except a brother

of the testator's, who had gone to sea, and had not been heard of for many years.

The Court held, that if the testator's brother died without issue in the lifetime of the testator, J. P. took, under the ultimate limitation contained in the will, an estate in fee-simple in the testator's real estates, and an absolute interest in his personalty.

DOE *d.* HUKMAN *v.* HASLEWOOD, H. T. 1837. K. B. 1 *N. & P.* 352.

Testator left all his property to his wife, and then added, "I make my wife sole executrix of the house in, &c."—Held, that she took a fee in the house.

DEVISE as follows:—"I give unto my wife, her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate whatsoever and wheresoever, and also all my right, title, and interest of, in, and to all and every sum and sums of money whatever, which now is, are, or shall be due to me upon and in virtue of any bill, bond, or other securities; I do likewise make my wife full and sole executrix of the freehold house situate," &c.

Per Cur.—It is to be observed, that it does not appear that the testator was possessed of any other property beyond that which is noticed by his will. Nor can we perceive an allusion to any other object of his bounty, except his wife. Moreover, in the earlier clause of the will, all the testator's personal property, including every thing due to him upon securities of every kind, is (though the word "heirs" is there as much misapplied as the word "executrix" to the freehold house), beyond all doubt, bequeathed to the wife. Having thus completed his purpose with respect to the whole of his personalty, the will immediately proceeds to notice the only remaining property of the testator—his freehold house, No. 15, Queen-street, in the parish of St. Giles. For what purpose, then, can we suppose that the house was introduced into the will at all? Why is it mentioned in immediate connexion with property most certainly disposed of, if he meant to die intestate with respect to it? We can discover no other probable or reasonable supposition but that the house was introduced into the will with the intention of disposing of it; and, if so, there is no other conclusion possible but that he meant the disposition to be in favour of his wife. We, therefore, think that, by the words "I do likewise make my said wife full and sole executrix of the freehold house," &c. the testator did intend to devise that house to his wife, and that (however inartificially he has executed his purpose) he fully believed that he had done so. Whatever effect can reasonably be given to the word "likewise," we are not, we think, authorized to reject and expunge, as wholly insignificant and unmeaning, a clause in the will in which we have no doubt that the testator himself thought his meaning had been most fully and even learnedly expressed; and, if this clause must be retained, as we are of opinion it must, it seems impossible to say that the testator did not intend to give to his wife some interest, and, if so, there is not only nothing to limit the intention to giving her any thing less than "the full and sole" dominion over the house in question, or, in other words, an estate in fee-simple therein.

DOE *d.* PRATT *v.* PRATT, H. T. 1837. K. B. 1 *N. & P.* 354.

So, upon the words, "I ap-

TESTATOR, after directing that his debts and funeral expenses should be paid by his executor, bequeathed annuities to two of his

relatives, and gave 5*l.* to his heir-at-law; and he then used the following words:—"I appoint W. P. my whole and sole executor of all my houses and land situate at F."

The Court held, that W. P. took an estate in fee.

point A. B. my sole executor of all my houses, &c., at," &c., A. B. takes an estate in fee.

DOE *d.* BOOLEY *v.* ROBERTS, E. T. 1840. Q. B. 3 *P. & D.* 578.

DEVISE in the following words:—"I give and bequeath to M., my wife, all my lands, messuages, and tenements, by her freely to be possessed and enjoyed with all my property whatsoever."

Per Cur.—It would be enough for the Court to say, that they cannot read this will without a full conviction that the testator meant to give his wife the fee with respect to these lands; but we draw our conclusion, in the present case, from the peculiar language employed, —the lands, messuages, and tenements are to be by the wife freely possessed and enjoyed with all the testator's property whatsoever. The case does not, indeed, find that the testator had any personalty. However, it is impossible that a man possessed of lands and tenements should be wholly without it; yet we are not to infer that fact from the probability alone. But he plainly thought he might die possessed of personalty, and in that case he clearly meant that his will should give it in the same manner as the lands. This appears to us to be a full indication that he gave both in perpetuity. A decision to this effect leaves all the cases untouched.

And a devise of land, to be enjoyed freely "with all my property whatsoever," passes a fee.

DOE *d.* SIMPSON *v.* SIMPSON, H. T. 1838. C. P. 4 *Bing. N. S.* 333.

A TESTATOR being seised in fee of certain premises, parcel of a manor, according to the custom whereof lands were forbidden to be entailed, devised as follows:—"I give, devise, and bequeath to my son, J. S., his heirs and assigns for ever, all my estates, dwelling-house, &c. But if it shall happen that my said son, J. S., shall die without leaving any child or children, in that case I give, devise, and bequeath all my before-mentioned estates, lands, &c., said to be given, devised, and bequeathed to my son, J. S., his heirs and assigns for ever, unto my five natural children, &c., to be equally divided amongst them, share and share alike; and, if any of my five children should die without issue, such share of him, her, and them so dying shall go equally amongst the survivors. My will also is, and I hereby order and direct, that, if my present wife should leave no issue to inherit the freehold estate at H., all the said estate shall be subject to the same mode of distribution amongst my aforesaid five children, as also the other property above mentioned, given and bequeathed to my said son, J. S., in case he dies without issue."

The Court held, that the estate taken by J. S. under the will was a fee-simple, conditional at common law; that the possibility of the testator's reverter descended, on his death, upon his son, J. S., as his heir-at-law, which estate became merged in his fee-simple; and, consequently, the demise of J. S., the first taker, to the lessors of the plaintiff was good, and the limitation over to the five children of the original testator was void.

Under a devise to "A. B., his heirs and assigns for ever; but, if he should die without issue," then over to certain natural children of testator:—A. B. takes a fee-simple conditional.

2. *Estate Tail.*

DOE *d.* ATKINSON *v.* FEATHERSTONE, H. T. 1831. K. B. 1 *B. & Ad.* 944.

The words "heirs of the body" are words of limitation*.

"I GIVE and bequeath unto my son-in-law, John Atkinson, and Elizabeth his wife, all that close, &c., to hold to them the said John and Elizabeth, for and during the term of their two natural lives, and for the life of the longer liver of them; and from and immediately after the decease of the survivor of them, then I give and devise the same unto the *heirs of the body* of the said Elizabeth, by the said John already begotten, or to be begotten, to be equally divided amongst them, share and share alike; all the rest, residue, and remainder of my real and personal estate, of what nature or kind soever, I give and bequeath to the said John Atkinson, whom I appoint sole executor of this my will."

The Court held, that the words "heirs of the body" were words of limitation, and were not altered by the subsequent words "to be equally divided," &c., consequently, that the first devisee took an estate tail.

DOE *d.* BOSNALL *v.* HARVEY, T. T. 1825. K. B. 4 *B. & C.* 610; S. C. 7 *D. & R.* 78.

Where it is the intention of the testator that gavelkind land shall remain in the family, the devisee takes in tail.

A MAN seised in fee of lands in gavelkind, devised all his real estate whatsoever unto his nephew T. C. for life, and then to trustees to preserve contingent remainders, and after the decease of the nephew, T. C., to the heirs of the body of T. C., as well female as male, to take as tenants in common, and not as joint-tenants, and for default of such issue to trustees for a term upon certain trusts, and after the determination of that estate, to his nephews, J. C. and C. C., for their respective natural lives, as tenants in common, and not as joint-tenants, and after their respective deceases, unto the heirs of the respective bodies of J. C. and C. C., as well female as male, to take as tenants in common and not as joint-tenants, and in default of such issue, to his own right heirs for ever.

The Court held, that it was the general intent of the testator that the estate should remain in the family of T. C., and that therefore he took an estate in tail general.

* A testator devised his freehold lands to trustees in fee, charged with an annuity, payable to J. H. D. out of his estate, and with so much of his debts and legacies as his personal estate would not extend to, upon trust, to pay the rents to his widow, who died before him, and after her death to apply the rents to his daughter Isabella, until she should attain twenty-five, and from and after her attaining that age, then to his daughter Isabella in fee; "but in case it should happen that my said daughter depart this life without leaving issue lawfully begotten," then he devised the same to W. F. and J. D. H. in fee. He also gave the trustees power to sell any part of the premises for payment of debts, &c. They did sell a portion for the payment of his debts. His daughter Isabella, before she attained the age of twenty-five, died without leaving issue, having suffered a recovery to bar the entail:—Held, first, that Isabella took an estate tail in the premises; secondly, that it vested immediately upon the death of the devisor; thirdly, that the trustees, however, took the legal estate, and her recovery only operated to bar the equitable remainder dependent upon the equitable estate. (*Doe* d. *Cadogan* v. *Ewart*, E. T. 1838, Q. B., 3 N. & P. 197).

DOE *d.* GARROD *v.* GARROD, H. T. 1831. K. B. 2 *B. & Ad.* 817.

A devise to A. B. for life and then to his son; if he had none, then over: the son takes an estate tail.

A TESTATOR, possessed of freehold lands and of copyhold lands of borough English custom, devised all to A. for life, remainder to A.'s son, remainder to the eldest son of that son, if he had one, but if he had no son, then to the next eldest regular male heir of his (testator's) family, so long as there should be one of them in being.

The Court held, that the son of the first devisee took an estate tail; and that the descent as to the copyholds must follow the custom; and, therefore, that the youngest son of the tenant in tail was entitled.

BROADHURST *v.* THOMAS, M. T. 1830. K. B. 2 *B. & Ad.* 1.

Devise to A. and afterwards to B. and his children, but in default of issue then over; B. takes an estate in tail.

TESTATOR devised all his real estate to his wife for life, after her decease, a part to his grandson, Alexander, his heirs and assigns for ever. Of other part he thus disposed:—To his daughter Ellen for life, remainder to her husband John for life. Then followed—"My will likewise is, that at the decease of my son-in-law, John, the same, the whole legacy to him shall go to my grandson William and to his children lawfully begotten for ever; but in default of such issue at his decease, to my grandson Alexander, his heirs and assigns for ever.

The Court held, that the grandson, William, took an estate tail.

RAGGETT *v.* BEATRY, M. T. 1828. K. B. 5 *Bing.* 343.

So, under a demise to A., the son of B., to enter and possess the land, &c., on the death of B., and if A. had no issue then over, A. takes an estate tail.

A TESTATOR devised lands "to the use of G. B., the second son of his nephew, J. B., to enter upon and possess the same after the decease of the father, the said J. B;" and by his will directed that J. B. and G. B. should, within one year next after his decease, pay 100*l.* to certain trustees named in the will, for them to discharge certain legacies, and that if J. B. and G. B. did not pay the 100*l.* within the time limited, the trustees should let the premises, and receive the rents until the 100*l.* should be paid, they keeping possession of the title-deeds, and not allowing J. B. and G. B. to sell or mortgage the estate until the legacies were paid; and that if G. B. should die, and have no child lawfully begotten of his body, the trustees should sell the premises, and distribute the produce amongst the brothers and sisters of the testator.

The Court held, that, under this devise, G. B. took an estate tail in the premises upon the death of J. B., his father.

CARNE *v.* ROCHE, M. T. 1830. C. P. 7 *Bing.* 226.

And a devise to the heir-at-law of A., A. being alive, and if the heir-at-law died, then to the next heir-at-law, passes an estate in tail.

DEVISE of all testator's real and personal estate unto the heir-at-law of Mrs. R., (Mrs. R. being then alive, and surviving the testator), and in case such heir-at-law should die without issue, then to the next heir-at-law of the said Mrs. R., and his or her issue.

The Court held, that the eldest son of Mrs. R. took an estate tail in the real estate devised by the will, as heir-at-law.

DOE *d.* JEARRAD *v.* BANNISTER, M. T. 1840. Ex. 7 *M. & W.* 292.

Under a devise to "A. B. and

A TESTATOR by his will devised as follows: "I give my house, &c., at Gittersham, to Sarah Smart and her heirs, if she has any

her heirs, if any, if not, to C. D., and then E. F., and his heirs," A. B. takes an estate tail.

child; if not, then, after the decease of herself and her husband, Richard Smart, I give it to Frances Macdonald and her heirs." Sarah Smart had a child, which died after the execution of the will, and in the lifetime of the testator; her husband also died, leaving her surviving.

Per Cur.—The language of this devise is not quite technical, which makes the reading a little obscure; but we think the most reasonable construction, and the only one which will satisfy the intention of the testator, is, that at all events Sarah Smart should have an estate for life; the words are: "I give my house &c., to Sarah Smart and her heirs, if she has any child." It has been contended these words mean, that, if at any time she should have a child, the estate should go to her and her heirs generally; but it appears to us that the testator considered the word "heirs" as children of the body, and so used it. The intention was, that the property should go to her for life, and at her death to her children, if any; but if no children to be her heirs, then it was to go over. We think that Sarah Smart took an estate tail.

NASH *v.* COATES, H. T. 1832. K. B. 3 *B. & Ad.* 39.

Under a devise to A. B. for life, upon his taking the testator's name, then to his children, with remainder over in trust, A. B. takes an estate tail.

R. N., by will, devised to trustees, and the survivor, and the heirs of such survivor, in trust for F. W., till he arrived at the age of twenty-one, upon his legally taking the name of R. N.; and then, upon his attaining that age, and legally taking the name of R. N., to hold to him the said F. W. during his natural life, and from and after his decease, to the trustees, and the survivor, and the heirs of such survivor, to preserve contingent remainders in trust for the heirs male of the body of the said F. W. lawfully issuing, and in default of such issue, to F. W., in the same terms.

The Court held, that F. W. took an estate tail.

FRANKS *v.* PRICE, M. T. 1838. C. P. 5 *Bing. N. S.* 37; S. C. 6 *Scott*, 710.

So, under a devise to A. and B. for life, and to their issue, and, if both or either die without issue, to the survivor, and then to C., and in default of issue over to the right heir, C. only takes an estate in tail.

TESTATOR devised lands to his two daughters for life, remainder to his sister for life, remainder to M. and N. for life, and, if either of them should die without leaving issue male, the whole to the survivor; but if M. should die after the testator's daughters and sisters, and before N., leaving issue male, then a moiety to the first and other sons of M. in tail male; and, in default of such issue to N. for life, remainder to his first and other sons in tail male; and, in default of such issue, to testator's right heirs; and there was a like limitation as to a moiety, in case of N. so dying; and if both M. and N. should die without issue male, or such issue die without issue male, the estate to go over to such person as, at the death of the survivor, should be the testator's right heir.

The Court held, that, upon the death of the testator's daughters and sister, and of M., without issue, in the lifetime of the daughters, N. took an estate tail in the whole.

DOE *d.* BURRIN *v.* CHARLTON, T. T. 1840. C. P. 1 *Scott, N. S.* 290; S. C. 1 *M. & G.* 429.

Devise by A. to his kinsman B.

A TESTATOR devised, after previous estates to his kinsman C., for life, and after to the eldest son of C., and, for want of such issue,

then to his daughter or daughters, share and share alike, for ever; "but in case my said kinsman have no issue, then to him and his heirs for ever."

The Court held that C. took an estate tail general.

for life, and his issue; if no issue, then to D., B. takes an estate tail general*.

DOE *d.* JONES *v.* OWEN, E. T. 1830. K. B. 1 *B. & Ad.* 318.

UPON a devise to testator's wife for life, and then to be relinquished to his son at her decease, and, if he should die without issue, then the real estate to go equally between his daughters, M. and S., for the life of M., and at her death the whole to S. and her heirs. He also directed that, if his son should survive his mother, he should pay S. 5*l.* within twelve months after the mother's death.

The Court held, that the son took an estate tail, with remainder, and not an executory devise, to M. and S.; and that the pecuniary legacy, payable to S. on the life estate in remainder to M., did not shew a different intent.

Devise to testator's wife for life, then to her son, and if he died without issue, then to her daughters. The son takes an estate tail, with remainder†.

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3. *Estate for Life.*

DOE *d.* SEWELL *v.* PARRATT, E. T. 1832. K. B. 3 *B. & Ad.* 460.

TESTATOR devised as follows: "I bequeath to the Hon. T. Stapleton 1200*l.*, being the amount of Lord Le Despenser's bond, to be paid by my executors into his own hands, for his sole and separate use; I also bequeath to him my chambers in the Albany, for which I paid six hundred guineas, with all my furniture, except such articles as I may particularly except from this donation."

Per Cur.—We think that A. only takes an estate for life in the chambers in the Albany, though there is no doubt, morally speaking, of the testator's intention to pass the fee: but we do not think that he has used words sufficient to express that intention.

Devise of "my chambers in A., with all my furniture, &c., except such as I may particularly except," passes an estate for life‡.

* Where, after a devise of lands to M. for life, remainder to the use of the heir of the body of M. in tail, with remainders over to divers parties for life, and to the heirs of their bodies respectively, in tail, the testator added, "the aforesaid limitations to be in strict settlement:"—Held, that M. took an estate in tail general in the real estates of the testator. (*Douglas* v. *Congreve*, M. T. 1837, C. P., 4 Bing. N. S. 1; S. C. 3 Scott, 223).

† Where the testator, by his will, devised lands to trustees, to the use of his wife for life, remainder to his three children, for their lives, in equal shares, and the issue of their respective bodies for their respective lives only, for ever; and in case of the death of either of the three children without issue, then for the survivors or survivor for life only, or their respective lawful issues, in equal shares, for life; and if but one, then to such one for life, and the heir of his or her body for ever, remainder over. Every child marrying was empowered to make a settlement of his share for the lives of the parties only and their issue, with remainder over in tail. By a codicil reciting the devise, he devised the premises, after the death of his wife, to the trustees in fee, in trust for his three children, as tenants in common, for ninety-nine years from his decease, if they or either of them should so long live, and after to the trustees to preserve &c.:—Held, that, under the will and codicil the children took, as tenants in common, estates for ninety-nine years, if they respectively should so long live, with remainders to the trustees in the codicil named, and their heirs, during the respective lives of the three children, to preserve &c., with remainder to the children as tenants in common in tail general, with cross remainders between them in tail general. (*Brooks* v. *Turner*, H. T. 1835, C. P., 2 Bing. N. S. 422; S. C. 2 Scott, 611).

‡ Devise to testator's children and their lawful issue in tail general, with benefit of survivorship as tenants in common. It appearing that the word "issue" was

DOE *d.* ASHBY *v.* BAINES, E. T. 1835. Ex. 2 *C., M. & R.* 23.

So, a devise to an executrix "of all and singular my lands, &c.," to be by her possessed and enjoyed, only passes an estate for life.

A TESTATOR directed, by his will, that his joint debts and funeral charges should be paid and charged by his executrix, thereinafter named. He then gave a legacy to his heir-at-law, and other legacies, and concluded thus: "Also, I give to E. S., whom I likewise constitute, make, and ordain the sole executrix of this my last will, all and singular my lands, &c., by her truly to be possessed and enjoyed."

Per Cur.—E. S. only takes an estate for life. The word "lands" used in a will is not equivalent to the word "estate" in a devise. In regard to the charge upon the devisee, the payment of the debts must, according to the opinion of *De Grey*, C. J., in *Goodright* d. *Phipps* v. *Allen*, Sir W. Blackstone, 1041, n., be charged for the real as well as personal estate; but we cannot construe this to be a charge on the real estate without express words.

DOE *d.* AMLOT *v.* DAVIES, H. T. 1839. Ex. 4 *M. & W.* 599.

Under a devise to the widow for life, and then to his daughters and their issue, they only take an estate for life.

A TESTATOR gave two houses to trustees in trust, to pay the rents, &c., to his wife during widowhood, and afterwards "to the use and behoof of all and every of my child or children by my said wife, equally to be divided between them, share and share alike, and the lawful issue of their or her or his bodies or body for ever." In a subsequent clause he said, "I give, devise, and bequeath unto my daughter, Frances James, the sum of 300*l.* when she attains twenty-one, and the house where she now lives, after the decease of her mother, or the day of her marriage; also, I give, devise, and bequeath unto my daughter, Rachel James, the sum of 300*l.*, when she attains twenty-one, and the house now in the occupation of David Davis, after the decease of her mother, or the day of her intermarriage." The two houses mentioned in the second clause were the same as the two first spoken of. The testator never had more than the two children named above.

The Court held, upon the construction of this will, that, upon the death of the mother the daughters became tenants for life in possession of these houses respectively, with immediate remainder to themselves as tenants in common in tail.

KNOCKER *v.* BUNBURY, H. T. 1840. C. P. 6 *Bing. N. S.* 306.

So, a devise to A., and to her children after her death, gives A. an estate for life.

A TESTATOR, being seised of real, and possessed of personal, property, after desiring his executors to purchase certain annuities for W. B. and her children, out of such monies of his as might come into their hands, devised as follows: "And, with regard to all the rest of my property, of what kind soever, I do hereby desire my executors, after payment of my just and lawful debts and funeral expenses, to pay and make over the whole to my beloved daughter, M. D. B., wife of ——, and to the children of my said daughter, after her decease."

The Court held, that the executors took no interest, under the

throughout the will used as synonymous with sons or daughters of children :— Held, that the testator's children took estates for life, with contingent remainders in tail general to the grandchildren. (*Cursham* v. *Newland*, T. T. 1835, C. P., 2 Bing. N. S. 58).

will, in the freehold property of the testator, but that they had the power to settle the freehold property upon the daughter for life, with remainder after her decease to her children in fee.

Doe *d.* Norris *v.* Tucker, E. T. 1832. K. B. 3 *B. & Ad.* 478.

By will, testator gave unto his wife his freehold estate, called Pouncetts, for her natural life. He gave her also his stock, goods and chattels, for life. He gave unto his heir 10*l.*, and then proceeded; "All the above-bequeathed lands, goods, and chattels, after the death of my wife I give and devise unto my children, share and share alike, equally to be parted between them."

So, under a devise to testator's wife of his freehold estate and goods for life, and afterwards to his children, to be divided between them, the children only take estates for life;

Per Cur.—We think that the children take only an estate for life. The expression, "freehold estate, called Pouncett's," means, we apprehend, only to describe the estate, and not the interest which the testator had in it. "All the above-bequeathed lands, after the death of my wife, I give" &c., would not of itself pass the fee. Then it is said that, by reference to the words in the will, "estate" should be construed to mean the whole of the interest which the testator had; but it is to be observed that the testator has changed the terms. In the bequest to his wife he says, "his freehold estate;" in that to his children, he uses the word "lands."

Bennett *v.* Lowe, E. T. 1831. C. P. 7 *Bing.* 533.

Devise to trustees, to pay rents and profits equally to A., B., C., and D., (females), for their respective separate use; and if they die, leaving daughters, the share or interest of the respective mothers to go to the daughters; provided that, in case any of them, A., B., C., or D. shall die without issue, then devise over.

and a devise to a female for life, and her daughter, and in default then over, is an estate for life.

The Court held, that A., B., C., and D. respectively took estates for life, and their daughters estates for life.

Doe *d.* Gwillim *v.* Gwillim, T. T. 1833. K. B. 2 *N. & M.* 247; S. C. 2 *B. & Ad.* 122.

"I give and bequeath to my dearly beloved wife the whole of my estates, and goods and chattels, and living stock, debts, during her widowship, and no longer, to keep it in possession, nor by any husband or helpmate, or company-keeper, or inmate, or by any person that take a lease of her life, or lodger, but directly to go to my dear children, as I have appointed and disposed to them, in lots and in money. Second, to my son, Joseph Gwillim, I leave 10*l.* of good and lawful money of Great Britain, out of my goods and chattels to be paid to him. Thirdly, to my son, Henry Gwillim, I leave the piece of ground called by the name of Jamesis Patch, to him and his lawful aires for ever; and if no aires, to his next brother, and his lawful aires for ever. Fourthly, to my son, George Gwillim, I leave the piece of ground called by the name of Joneses Patch, to him and his lawful aires for ever; and if no aires, to his next brother, and his lawful aires for ever. Also, to my son, John Gwillim, I leave my dwelling-house, rail shop and cider mill, stables and pigscot, garden, brew-house, and the piece of ground adjoining it; also, my goods and chattels and living stock that I shall leave. Also, to my daughter, Mary Leyrigs, I leave the house, called by the name of the Dancing

Under a devise to several, with words of inheritance, and one without words of inheritance, he only takes an estate for life.

House and Gardens, and to her son, Henry Leyrigs, and his lawful aires for ever."

Per Cur.—Each will must be construed with reference to its own words. The case of *Gall* v. *Esdaile* (8 Bing. 323) does not appear to us to be applicable. At first, we were inclined to think that the word "estate" in this will carried the fee; but seeing that, in other parts of the will, the testator specifically speaks of the heirs of the devisee, we think it must be taken that he used words of inheritance where he intended to give such an estate.

DOE *d.*VINER *v.* EVE, T. T. 1836. K. B. 5 *Ad. & E.* 313.

So, under a devise to A. B. for life, and afterwards to the testator's three nieces, "for their own use and purpose," they only take an estate for life.

BY a devise the testator directed that, out of the rents and profits of his estate, his debts &c. should be paid, and then gave, subject to the keeping in repair, the rents &c. to C. V. for life, and, after his death, he gave all that freehold premises, situate at &c., unto his three nieces, to and for their own use and purposes equally, and the rest and remainder of his property &c., be it what it might, he left to C. V.

The Court held, that the nieces took only a life estate.

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4. *Copyholds.*

EDWARDS *v.* BARNES, M. T. 1835. C. P. 2 *Bing. N. S.* 252; S. C. 2 *Scott*, 411.

Under the words, "all my other property whatever and wheresoever," copyhold passes*.

TESTATOR devised as follows: "I give, devise, and bequeath unto my wife, M. D., all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of my said wife, M. D., her heirs, executors, administrators, and assigns for ever, subject, nevertheless, to the payment of 60*l.* per annum to my sister, S. H., of one annuity arising from one part of the ground rents payable to me out of my manor of Bincton, and of the other part out of the ground rents payable to me out of Moffat-street," &c.

The Court held, that certain copyhold estates, of which testator was seised, passed under the words, "all other my property whatsoever and wheresoever," it appearing to be the intention of the testator that all he was worth should pass by his will, and there being no words in the will to restrict or narrow the meaning of the word "property."

CHAPMAN *v.* PRICKETT, E. T. 1830. C. P. 6 *Bing.* 602.

Devise to trustees of all freeholds does not pass a copyhold.

A TESTATOR, by will, devised to trustees all his freehold messuages, stock, or shares in any of the public funds, and all money in hand, or debts due to him, and all shares or property whereof he might be possessed of or entitled to, upon certain trusts. By a codicil he directed his copyhold to be transferred to his wife until the expiration of certain leases, or till her death, and then to be sold for the benefit of his children and their heirs.

* Copyhold held to pass by the devise of an heir, although he had not been admitted nor had surrendered to the use of his will, under the 55 Geo. 3, c. 192. (*Doe* d. *Perry* v. *Wilson*, T. T. 1836, K. B., 5 Ad. & E. 321).

The Court held, that the copyhold did not pass to the trustees by the will; but that the interest in them passed to the wife, determinable on the expiration of the lease, or at her decease.

DOE *d.* EUSTACE *v.* EASLEY, H. T. 1835. Ex. 1 *C., M. & R.* 823.

A MAN devised copyhold lands to his widow for life, remainder to his nephew and his nephew's wife for life, remainder to the daughter of his said nephew, for life, to revert to his next male heirs for ever.

Where copyhold is to revert to the next male heirs for ever, the customary heir takes.

The Court held, that, on the determination of the estates for life, the next customary heir male of the body was entitled to the estate in remainder, and not the general common-law heir, who was a male, but the descendant of a female.

SHEPPARD *v.* WOODFORD, H. T. 1840. Ex. 5 *M. & W.* 608.

DEVISE to three trustees upon certain trusts, and in the event of any of the trustees dying or refusing to act, a new one to be appointed. In the execution of the trusts several copyhold estates were purchased, and subsequently, one of the trustees dying, and another declining to act, the third surrendered the copyhold estates to himself and two new trustees, and the three were admitted joint-tenants of the manor by the lord.

Devise of copyhold to three trustees, not to be less; if one dies, on a new one being appointed, the fine will be calculated on two years' value, half for first life, and half for the second life, &c.

The Court held, that, though one of the surrenderees was also surrenderor, this was an admittance of the three to a new estate, and that the fine, being payable in respect of that new estate, was correctly assessed, as upon an admission de novo of three tenants as joint-tenants of an estate. The proper mode of calculating the fine in such a case is, two years' improved value for the first life; half of that for the second, and half again for the third.

5.—*Estate pur autre Vie.*

DOE *d.* JEFF *v.* ROBINSON, E. T. 1828. K. B. 8 *B. & C.* 296; S. C. 2 *M. & Ry.* 249.

A TENANT of lands, granted to him and his heirs pur autre vie, devised them "to his daughter, E. R.," without any words of limitation, or shewing an intention to pass his whole interest; and the devisee died during the life of the cestui que trust.

Part of an estate not disposed of passes to the heir as special occupant.

The Court held, that, being a partial devise, the part of the estate not disposed of passed under the 29 Car. 2, c. 3, s. 12, to the heir of the devisor as special occupant.

6.—*In Remainder.*

DOE *d.* LONG *v.* PRIGG, E. T. 1828. K. B. 8 *B. & C.* 231; S. C. 2 *M. & Ry.* 338.

DEVISE to A. for life, afterwards to B. for life, and after the decease of A. and B., unto the surviving children of J. and W., and to

Devise to A. for life, then to

B. for life, then to the surviving children of C., is an estate in remainder*.

their heirs for ever; "the rents and profits to be divided between them in equal proportions, share and share alike."

The Court held, that the estates vested in remainder, immediately upon the testator's death, in the then children of J. and W.

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7. *Executory and Conditional.*

CADELL *v.* PALMER, T. T. 1830. C. P. 10 *Bing.* 140.

An executory devise must not be too remote†.

A LIMITATION by way of executory devise, which is not to take effect until after the determination of one or more lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person, upon a case referred to

The Judges, was held to be not too remote or otherwise void; but that if to such term in gross there had been added the number of months equal to the ordinary or longest period of gestation, and the whole of such years and months were to be taken as a term in gross, and without reference to the infancy of any person whatever, born or

* Under a devise to A. for life, remainder to the right male heir of the testator in fee, the remainder vests upon the death of the testator in the person *then* answering the description of heir male. (*Pilkington* v. *Spratt*, M. T. 1833, K. B., 2 N. & M. 524). Devise to A., B., C., and D. successively, in strict settlement. Proviso, that if the title of Earl of S. shall come to A., B., C., and D., (devisees for *life*), or their sons, within the period of the lives of the said A., B., C., or D., or within the term of twenty-one years after the decease of the survivor of them, then and in such case as and when the title of the said Earl of S. shall come and fall into possession to him or them, the estate which he or they then shall be entitled unto in all and every the manors hereinbefore described, shall cease and determine and become void; and the same manors shall immediately thereupon go to the person or persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of the devise, in case he or they to whom the title shall come and fall in possession as aforesaid, was or were actually dead without issue:—Held, that, although the words from "time to time" are not inserted, yet the proviso attached to each of the estates created by the will as they should successively vest in possession. The effect of this proviso, in the event of the title descending on a tenant for life, is not to let in the *son* of such tenant, but to carry the estate over to the next branch of the family. The will in which the above proviso was inserted contained a devise to A. for life; remainder to trustees during his life, to preserve contingent remainders; remainder to F., the son of A., in tail; remainder over. A. and F. suffered a recovery. The title of Earl of S. descended upon A.:—Held, that the uses to arise under the proviso are not barred by this recovery. (*Doe* d. *Lumley* v. *Scarborough*, E. T. 1835, K. B., 4 N. & M. 724; S. C. 3 Ad. & E. 2, reversing judgment of C. P.).

† Devise to A. and B., and their heirs, to sell and dispose, at their discretion, of all the testator's right in King's Sedgmoor, belonging to the manor of Moorlinch, and all his right in Moorlinch, if an act should pass for inclosing the said moor within twenty years, and to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates:—Held, that the devise was in the nature of an executory devise, to take effect on the passing of the act; and that, under the devise, the devisees took a quarter of the money produced by the sale of the allotments in King's Sedgmoor in respect of the manor of Moorlinch, and the whole of the proceeds of the sale of allotments in respect of lands in Moorlinch. (*Gardner* v. *Lyddon*, T. T. 1829, Ex., 3 Y. & J. 389).

en ventre sa mere, such limitation would have been void, and remote: twenty-one years is the limit, and the period of gestation is to be allowed in those cases only in which the gestation exists.

WARE *v.* CANN, H. T. 1830. K. B. 10 *B. & C.* 433.

Land taken subject to conditions is an excutory devise.

ON a case from the Vice-Chancellor, it appeared that testator devised lands to A. B. and his heirs for ever; but if A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; or if in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to C. D.

The Court held, that A. B. took an estate in fee, with an executory devise over to take effect on conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under that will.

DOE *d.* GOLDING *v.* LAKEMAN, H. T. 1831. K. B. 2 *B. & Ad.* 30.

A conditional devise to daughters, subject to the event of a son returning to England and taking possession, confers an estate in fee on condition.

A TESTATOR, having daughters in England, and an only son in the West Indies, thus devised: "I give and devise to my son, R. H., now of the Island of St. Christopher's, all that, &c., to hold the said premises to my said son R. H., his heirs and assigns for ever, subject nevertheless to the payment of the sum of 600*l.* to my said three daughters; and I do hereby direct that, until my said son R. H. or his heirs shall come to England, and also to pay the said 600*l.*, that he shall not have the possession of the said estate, but that the rents and profits shall be equally divided among my said daughters until my said son shall return to England and pay the said sum." Then followed a power to the daughters to let for seven years. "And in case my said son shall not come to England during his lifetime to take possession of the said estate, and shall die without having any issue lawfully to be begotten, then I do give and devise the said estate to my said daughters in equal parts as tenants in common, and to the respective heirs of their several bodies for ever."

The Court held, that the daughters took not an estate tail, but either an estate in fee on condition to determine when R. H. or his heirs should return to England and pay the 600*l.*, or a chattel interest to continue until such return and payment.

DOE *d.* NOBLE *v.* BOLTON, M. T. 1839. Q. B. 3 *P. & D.* 135.

A devise to a widow during her widowhood, or till her son attained twenty-one years, is only a devise to the widow until either of these events occur.

DEVISE—"I give all that my manor of M. and my capital mansion to E. and L., in trust to permit and suffer my wife, in case she wish to occupy the same, and to receive the rents, issues, and profits thereof until my son M. shall attain the age of twenty-one, provided my said wife continue unmarried; and upon the attainment to age of my said son, then in trust to release the said manor, mansion-house, &c., unto the use of my son, &c.; provided that, in case of my said wife marrying again, or not wishing to reside in my said mansion-house, the trustees to let the same at the best rent, &c.

The Court held, that, on the wife's taking possession, the legal estate in the manor (though not in the mansion-house) vested in the wife during her widowhood, or until her son's majority.

DOE *d.* SHAW *v.* STEWARD, E. T. 1834. K. B. 1 *Ad. & E.* 300; S. C. 3 *N & M.* 372.

Devise of a leasehold to A. for life, and then to his wife, B., if they should inhabit the house during the term :—Held, that the wife being in possession, but the husband going abroad, was no forfeiture.

DEVISE to A. of a term of years in a house, "if he should so long live and continue to inhabit therein; and from and after his decease, or giving up the possession of the premises, or in case he should mortgage, &c., then to the wife of A. for the remainder of the term. The husband, being in embarrassed circumstances, went beyond the sea for six months, leaving his wife and children in the house, and subsequently returned and lived in the house; but, upon his bankruptcy, they were turned out by the assignees.

The Court held, that his leaving was not a ceasing to inhabit within the meaning of the will, his wife continuing in possession; nor, comme semble, was the turning out by the assignees a giving up of the possession by the bankrupt within that clause.

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8. *Estate in the residue.*

DOE *d.* MORETON *v.* FOSSICK, T. T. 1830. K. B. 1 *B. & Ad.* 786.

All which a testator has passes by the residuary clause, unless a contrary intention appear.

A TESTATRIX devised certain copyhold estates to her mother for life; then to other persons for their lives, and to their children in fee. All the residue she devised to her mother in fee; but charged such residue, real and personal, with an annuity of £20 to her grandmother for life.

The Court held, that the provision for the grandmother did not indicate an intention to limit the effect of the residuary clause; and, consequently, that the reversion in the copyholds passed to the mother. The general rule is, that all which a testator has passes by the residuary clause, unless an intention appears from other parts of the will to limit the effect of that clause.

PULLIN *v.* PULLIN, E. T. 1825. C. P. 3 *Bing.* 47.

As land not specifically devised under the residuary clause of all the rest, residue, and remainder of the testator's freehold, &c*.

A TESTATOR in his will recited, that he was seised in fee of divers freehold messuages, and of certain copyhold or customary lands, in the parish and manor of St. Mary, Islington, and all which freehold and copyhold messuages and lands were subject to a mortgage made by the testator to S. R., for securing to him the payment of a certain sum of money; he then gave and devised all and every his said freehold and copyhold messuages to B. P. and W. A., and their heirs, upon trust for certain purposes declared in his will; and all the rest, residue, and remainder of the testator's freehold, copyhold, and leasehold estates, and also all his goods, chattels, and personal estate he gave, devised, and bequeathed to his son, J. P., whom he appointed his executor; and the testator, at the time of making his will, and at his death, was also seised in fee of twenty-one acres of

* Under a general devise of all the rest, residue, and remainder of, &c., in all and singular the property, estate, and effects which the testator should be possessed of, or entitled to, or over which he should have a disposing power at his decease, of whatsoever nature or kind the same might be :—Held, that the legal estate in mortgaged premises did not pass, but descended to the testator's heir-at-law. (*In re Horsfall*, E. T. 1825, Ex. Chamb., 1 M. & Y. 292).

land at Islington, lying separate from the other freehold and copyhold estates comprised in the mortgage to S. R , as well as of other leasehold estates elsewhere.

The Court held, that the twenty-one acres of which the testator was seised at Islington, which were not comprised in the mortgage to S. R., did not pass by the devise to B. P. and W. A. to trustees, but to J. P., under the residuary clause of the will.

WILLIAMS *v.* GOODTITLE, E. T. 1830. K. B. 10 *B. & C.* 895.

So, under a devise of estates bad in law, the estates may pass under the residuary clause.

AFTER devises for life, the testator bequeathed the residue of his lands in fee, and after-acquired lands; he afterwards purchased lands, and by a codicil he ratified his will in all respects; and after giving his wife a life estate in the latter estates, devised the remainder over, in trust for purposes which were bad in law.

The Court held, that, by virtue of the republication, the wife was entitled to the remainder of such after-purchased lands under the residuary clause in the will.

DOE *d.* HOWELL *v.* THOMAS, T. T. 1840. C. P. 1 *Scott, N. S.* 359; 1 *M. & G.* 335.

The words "all the residue of my estates, over which I have power," are sufficient.

THE testator being possessed of three estates, one settled in tail on his eldest son, with an ultimate limitation to himself in fee, upon the determination of the estate tail, by his will gave his eldest son a small pecuniary legacy, in satisfaction of all claims under his marriage settlement, "save in regard to the real estates settled upon him, *over which I have no power;*" he then devised another estate to his second son; and all the residue of his estate, over which he had any power, to the youngest.

The Court held, that the general words being sufficient to include the estate in reversion expectant, &c., carried such interest to the residuary devisee.

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9. *Of the Heir-at-Law.*

DOE *d.* WINTER *v.* PERRATT, H. T. 1826. K. B. 5 *B. & C.* 48.

The male heir must be taken in the legal sense.

A TESTATOR, seised in fee, devised as follows:—To certain persons for lives, and at the termination of those lives "to the first male heir of the branch of R. C." At the termination of those lives the following was the situation of R. C.'s family:—He had had five daughters; the eldest had issue, but they were all daughters. The second had male issue, but she was herself living. The third had had male issue, and had died during the continuance of the life estates, but after the next youngest sister. The fourth had had male issue, and had died during the continuance of the life estates, but before the next eldest sister. At the time of the will being made, the testator knew that R. C. had daughters only.

Held, by *Holroyd*, J., and *Littledale*, J., that the son of the fourth daughter was the person who answered the description of "first male heir;" because, by the death of his mother, who died first of all, leaving a male, he was the only person filling the charac-

ter of "male heir" in its legal sense:—Held, by *Bayley*, J., that the son of the second daughter answered the description; and that the testator meant "first male heir," with reference to the proximity of the line; and that the life or death of either of the daughters was foreign from his intention.

RUSSELL *v.* BUCHANAN, E. T. 1834. Ex. 2 *C. & M.* 561; S. C. 4 *Tyrw.* 384.

Where the devise and devise over fail, the heir-at-law takes.

A TESTATOR devised certain freehold premises to his wife during widowhood, and after her death or marriage to his nephew, R. B. R., for life, and after his decease unto and equally between all and every the children of his said nephew, R. B. R., their heirs and assigns respectively, as tenants in common, if more than one; and if there should be but one child, then the whole to such only child, his or her heirs and assigns; but, in case there should be no child or children of his said nephew, R. B. R., living at the time of the decease or marrying again of the testator's said wife, then over; and he devised the residue of his real estate to certain other persons in fee. The testator, by a codicil bearing even date with and executed at the same time as the will, directed "that neither the said R. B. R., nor any or either of his issue, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years; and in case of the death of any one or more of such children under such age, then the share or shares of such children so dying shall go to the surviving brother or sisters," &c. R. B. R., during the life of the testator's widow, attained the age of twenty-one, and upon her decease took possession of the devised premises, and at his death left several children, all under the age of twenty-one.

The Court held, that the devises to the children, and the substituted devises over, failed, and that the heir-at-law was entitled to the devised estate.

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10. *Joint Tenants and Tenants in Common.*

GOODTITLE *v.* OXLEY, E. T. 1829. K.B. 7 *D. & R.* 535.

A devise to A., B., and C., and their heirs equally, is a joint-tenancy.

DEVISE of lands to A., B., and C., and their heirs, "to be sold, and the money to be equally divided amongst them."

The Court held to constitute a joint-tenancy in the land, and a tenancy in common in the produce when sold; but that the latter did not control the former, as the whole intention might thereby be defeated.

DOE *d.* YOUNG *v.* SOTHERON, T. T. 1831. K. B. 2 *B. & Ad.* 628.

So, a devise to A. and B. jointly, and the survivor of them, their heirs and executors for ever, creates a joint-tenancy in fee.

DEVISE. "I give and bequeath all my real and personal estate, of what kind soever, unto my sister, Margaret Sackwell, wife of Thomas Sackwell, and Elizabeth Sackwell, daughter of the said Thomas and Margaret, jointly, in trust for certain uses therein mentioned, and do appoint them executrixes of this my will, and do give them the residue or remainder of all my real or personal estate, to them, and the survivors of them, their heirs and executors for ever."

The Court held, that, under the devise to Margaret and Elizabeth of the residue, to them and the survivor of them, their heirs and executors for ever, they took a joint-tenancy in fee.

ROE *d.* RICHLEY *v.* BURN, H. T. 1827. K. B. 6 *B. & C.* 289.

I DEVISE "unto A. B., my wife, the whole of my effects during her life; also the freehold estate which I now enjoy I bequeath as follows: A. B., my daughter, T. B. and J. B., my sons, likewise B. B., all the last-mentioned names to be all equal sums, whatever it may amount to, except any of the afore-mentioned should die or be deceased, then their shares to be equally divided among the other that is surviving"—

A devise of property equally to be divided, and to the survivor, is a tenancy in common.

The Court held, that the four persons last named took under this devise as tenants in common; and that B. B., the lessor of the plaintiff, was entitled to recover in ejectment, after ouster by A. B., another of those devisees.

DOE *d.* LITTLEWOOD *v.* GREEN, M. T. 1838. Ex. 4 *M. & W.* 229.

ON a special case, it appeared that Elizabeth Green, the defendant, and Jane Pearson, the mother of the two female lessors of the plaintiff, were the nieces of the testator. By his last will and testament, in 1799, after devising certain estates, comprised in the declaration in this ejectment, for certain lives, which had become extinct since his death, he gave and devised the same to his nieces, Elizabeth Green and Jane Pearson, equally between them, to take as joint-tenants, and to their several and respective heirs and assigns for ever. Both the nieces were living at the time of the testator's death, but when the last tenant for life died, Elizabeth Green, the defendant, had survived Jane Pearson, whose heirs at law, at that time, were her two daughters, the lessors of the plaintiff. Elizabeth Green took possession of the whole estate, as surviving devisee, claiming a joint-tenancy with her sister. The lessors of the plaintiff claimed as heirs of Jane Pearson, who, as they insisted, took an estate of inheritance, as tenant in common with her sister.

So, under a devise to testator's nieces, "equally between them, to take as joint-tenants, and their several and respective heirs for ever," they take as tenants in common, subject to the joint lives, and life of the survivor.

Per Cur.—We are clearly of opinion, that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, took an estate for their joint lives, and the life of the survivor, that is, as joint-tenants, with remainder to each of them as tenants in common in fee, after the death of the surviving life; in other words, that they took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor. The authority for this construction is to be found in Littleton's Tenures, sect. 283, in which it is said, "that if lands be given to two men, and to the heirs of their two bodies begotten, in this case the devisees have a joint estate for term of their two lives, and yet they have several inheritances; for if one of the donees hath issue, and die, the other which surviveth shall have the whole by the survivorship for the term of his life; and if he who surviveth hath issue, and die, then the issue of the one shall have the one moiety, and the issue of the other the other moiety, and they shall hold the land in common, and they are not joint-tenants."

CURSHAM *v.* NEWLAND, T. T. 1838. Ex. 4 *M. & W.* 101; S. C. 2 *Scott*, 105; S. C. 2 *Bing. N. S.* 58.

A devise to the testator's sons and daughters, and their children, but not to vest until they attain twenty-one years of age, and, in the event of death, the share to go to the survivors:—Held, that they took as tenants in common, with contingent remainders.

DEVISE of estates to testator's son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship, and amongst their issue respectively, as tenants in common; but such issue, being sons, not to have vested interests until twenty-one, or daughters, until twenty-one or marriage, with powers to trustees to advance, &c., to the extent of one half, the presumptive share of each child; and in case his son or daughters, or either of them, should die without leaving lawful issue, or with lawful issue, and such issue being a son should not attain twenty-one, or a daughter not attain twenty-one nor be married, then the share of the party so dying to be for the benefit of the survivors and their issue, in same manner as their original shares.

The Court held, that the son and daughters took estates for lives as tenants in common, with contingent remainders in their shares to their respective children, by purchase, as tenants in common in tail, with cross-remainders in tail between such children in each respective share, with cross-remainders over in the whole of each of such shares respectively (on failure of all the children of any one son or daughter and their issue) to the survivor or survivors of the testator's son or daughters for life, remainder in tail general to the children of such surviving son or daughters respectively, in like manner as the original share given to such son or daughters respectively, and that the son and daughters, and their children respectively, took corresponding interests in the leaseholds devised by way of executory bequest after the death of the testator's widow.

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11. *To Trustees.*

DOE *d.* KEEN *v.* WALBANK, T. T. 1831. K. B. 2 *B. & Ad.* 554.

Under a devise to demise, pay, and receive rents, &c., the trustees take a fee.

DEVISE to trustees and their heirs upon certain trusts. Then followed similar devises of other lands. At the close were these words:—"And I hereby will, order, and direct, that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty, and trust, or otherwise."

The Court held, that the trustees took the whole legal estate in fee.

DOE *d.* STEVENS *v.* SCOTT, H. T. 1828. C. P. 4 *Bing.* 505; S. C. 1 *M. & P.* 317.

So, under a devise in trust for the testator's daughter, to receive the rent, &c., free of any husband, the trustees take the legal estate.

DEVISE. "I give and devise unto Charles Stevens and his heirs all that my freehold messuage or tenement, dwelling-house, and premises, with the work shops, back building, and appurtenants, situated in Aylesbury-street, Clerkenwell, now on lease to and in the possession of Mr. Scott; and all that my freehold messuage or tenement, with the appurtenants, situate and being in the possession of A. B., or his under-tenants, in trust to and for the sole and

separate use of my daughter, Sarah Scott, (the wife of the defendant); and to convey, assign, and assure the said last-mentioned freehold messuage, tenement, workshops, hereditaments, and premises unto her, the said Sarah Scott, her heirs, and assigns for ever, free from, and independent of, the debts, controul, power, or engagements of any present, or any *future*, husband; and to empower and permit her to take and receive the rents, issues, and profits of the said last-mentioned premises, and to give receipts and discharges for the same, from time to time, or to appoint any person to receive the same, as if she was sole and unmarried.

Per Cur.—If there be any remedy for the defendants in this case, it must be sought for in a court of equity. By the will of Mary Wilcox, the legal estate in the premises in question vested in the trustee, Stevens, and not in Sarah Scott. The evident object of the devise was, that the rents and profits should be secured to the testatrix's daughter during her life, free from the debts or controul of her husband, and to be conveyed to her heirs at her decease. The will gives no power to Sarah Scott to devise, and we cannot presume a power, as has been intended. The case of *Jones* v. *Lord Say and Sele*, (1 Eq. Ca. Ab. 283), is expressly in point, and is an undoubted authority. The will directs the trustee to convey to Sarah Scott, it is true, but he could not have conveyed to her during the lifetime of her husband, for the estate was to be free from the power or control of the latter, nor could the trustee have conveyed to Sarah Scott after the death of her then husband, for he was still to hold it in order to protect it from the controul of any future husband. As to whether the legal estate is vested now in the trustee or in the heir-at-law is quite immaterial, it being clear that the devise by Sarah Scott to her husband could pass nothing to the latter; the legal estate being in the trustee.

DOE *d.* GREATREX *v.* HOMFRAY, H. T. 1837. K. B. 1 *N. & P.* 401.

So, under a devise "to trustees, to pay the rents, &c., to the testator's son for life," the legal estate is in the trustees.

EJECTMENT. The lessor of the plaintiff claimed under the following will:—"I give and devise all those my farms, messuages or tenements, and premises, called or known by the names of &c., situate in the parish of Langainarch, in the county of Brecon, and now in the several occupations of &c., unto my son, James Jones, to hold to my said son, James Jones, his heirs and assigns for ever, and all other my freehold estates, situate in the several parishes of &c., in the said county of Brecon, with their respective purtenances thereunto belonging, and every part thereof, to the use and intent that the Rev. Richard Davis, archdeacon of Brecon, and Walter Levi Lewis, of Trevella, in the county of Brecon, minister of the Gospel, their executors, administrators, or the executors, administrators of the survivor of them, shall and may receive and take the rents, issues, and profits of the above-mentioned estates, and pay the same to my son, James Jones, for and during the term of his natural life; and from and immediately after his decease, then I give and devise the same, and every part thereof, to the heirs of the body of my said son James Jones lawfully to be begotten; and in default of such issue, then I give and devise the same, and every part thereof, to my daughter Catherine Jones, and the heirs of her body lawfully to be begotten; and in default of such heirs, then I give and

devise the same, and every part thereof, unto my son John Jones, his heirs, and assigns for ever." The trustees appointed by the will disclaimed, and executed a deed of disclaimer. A bill was filed in Chancery, and the present lessors of the plaintiff were appointed trustees to carry the trusts of the will into effect. It was objected, at the trial, that the legal estate was not in the trustees but in James Jones, and *Patteson*, J., was requested to nonsuit; but he refused to do so, reserving the point.

Per Cur.—In this case, we are of opinion, that the devise gives the legal estate to the trustees. We do not think that there is any difference on account of the contingency which succeeds the direction to the trustees to pay over the rents to the son. *Doe* d. *Leicester* v. *Biggs* (2 Taunt. 109) is not an authority governing the present case. The will there did not direct the trustees to do any thing. Here is a direction to them to pay the rents, which they could not do without having the power to receive them. Mr. Justice *Patteson* was of this opinion at the trial.

DOE *d.* BOOTH *v.* FIELD, T. T. 1831. K. B. 2 *B. & Ad.* 564.

So, where, after the death of the tenant for life, trustees are to convey to other persons, they take a fee.

DEVISE to trustees, their heirs, and assigns for ever, upon trust to pay the rents to a married woman for her life, notwithstanding her coverture, and, after her decease, to convey to the use of such persons as she should appoint.

The Court held, that this passed the whole legal estate in fee to the trustees.

BARKER *v.* GREENWOOD, M. T. 1838. Ex. 4 *M. & W.* 421.

So, under a devise to trustee, to permit and suffer the testator's widow to receive the rents and profits, the trustees take the legal estate.

DEVISE to A., B., and C., and their heirs, of all the devisor's real estates, to hold to A., B., and C., and the survivors and survivor, and the heirs of the survivor, in trust to permit and suffer A. to receive and take all the net rents and profits for her life, and from and after her death upon further trust to permit and suffer B. to take all the net rents and profits for her life to her own separate use independent of her present or any future husband, and after her death upon further trust to permit and suffer C. to take all the net rents and profits for her life.

The Court held, that the legal estate vested in the trustees.

WHITE *v.* PARKER, E. T. 1835. C. P. 1 *Bing. N. S.* 573; S. C. 1 *Scott*, 542.

Where trustees are directed to pay all mortgages, and permit testator's daughters to receive three-fourths, and his son one-fourth, the trustees take the legal estate.

THE testator devised to trustees in trust as to one-fourth part of his estate, that they should pay, or permit and suffer his wife to have and receive, the clear yearly rents and profits thereof, for and during the term of her natural life. The will contained a similar devise to the trustees, as to his two daughters; the several parts and shares of the wife and daughters to be for their sole and separate uses whilst under coverture, and to be paid into their own hands. As to the other fourth part, a similar devise to the trustees to permit and suffer his son to receive the clear yearly rents and profits during his life. The trustees were also, out of the rents and profits, to pay taxes, and keep the premises in repair, to let, &c., for the best improved rents for seven years, and to retain their own expenses. In an action of covenant—

The Court held, first, that the entire estate was vested in the trustees; and that, as to one-fourth, the use was not executed in the son, the cestui que trust; and, secondly, where the testator directed that, upon the death or refusal to act of one trustee, another should be appointed, and where, upon the death of one, the surviving trustee conveyed the estate to the defendant by a deed of lease and release, to which the cestui que trusts were parties, to hold to himself and his heirs, not jointly with the co-trustee, that the legal estate passed by such conveyance to the defendant as trustee.

HOUSTON *v.* HUGHES, E. T. 1827. K. B. 6 *B. & C.* 403.

Under a devise to trustees, and their heirs and assigns, to pay debts, &c., and to apply the rents, &c., of freehold land, &c., to the use of A. and B., the trustees take a fee.

TESTATOR being seised in fee of certain freehold and copyhold lands, and of leaseholds for lives and for terms of years, after directing payment of debts and funeral expenses, devised and bequeathed to trustees all his freehold, copyhold, or leasehold estates, to hold the freeholds unto themselves, their heirs and assigns; and the copyhold, and all such other of his estates as were less than freehold, unto themselves, during all the right and title of the testator; and all his personal estate to the said trustees, in trust to apply the income and annual amount of such property to the use of his two nieces, for their lives; and, after their decease, to the use of their children and grandchildren, &c. The devise was in such obscure and doubtful language as rendered it difficult to determine what was the real intent of the testator with regard to those children and grandchildren, or what equitable interests they would respectively derive under the will.

The Court held, that the trustees took an estate in fee-simple in the freehold and copyhold lands, and the whole interest which the testator had at the time of his death in the leaseholds for lives and for years.

KING *v.* SHRIVES, T. T. 1835. C. P. 4 *M & Scott*, 149; S. C. 10 *Bing.* 208.

If the personal estate fails to pay the debts, trustees may sell land.

TESTATOR devised, in general words, all his goods, chattels, estate, and effects of what nature, sort, kind, quantity, or quality (not hereby otherwise disposed of) whatsoever and wheresoever, upon certain trusts; first, for the payment and discharge of his just debts, funeral expenses, &c.; and that whatsoever should remain after such discharge, of his personal effects, should be appropriated to the use, interest, and benefit of his family. He also willed that, when his youngest son came of age, the said trustees should sell or dispose of his estate, the produce of which was to be divided into three equal parts.

The Court held, that, upon the failure of the personal estate to pay the debts, it was competent to the trustees to sell and dispose of the lands to make up the deficiency.

DOE *d.* GORD *v.* NEEDS, M. T. 1836. Ex. 2 *M. & W.* 129.

If trustees only take a chattel interest, the trust ceases when the trust is satisfied.

A. DEVISED his freehold lands, held in fee simple, to two trustees, without using words of inheritance, in trust to suffer his wife to enjoy the rents and profits for her life, and after her death to pay out of the rents an annuity of 10*l.* to his brother for ten years. He also bequeathed several pecuniary legacies to various legatees, and

directed the trustees to pay them when the legatees came of age, and appointed his widow his executrix. He devised land to George Gord, the son of George Gord, and a house to George Gord, the son of Gord; and he bequeathed pecuniary legacies to George Gord, the son of George Gord, and to George Gord, the son of John Gord.

The Court held, that the trustees took a chattel interest till the annuity and legacies were paid, when the trust ceased.

GLOVER *v.* MONCKTON, E. T. 1825. C. P. 3 *Bing.* 13.

So, a devise to trustees to raise a certain sum, the trust continues until the sum raised.

A TESTATOR devised all his real and personal estates to trustees and their heirs, upon trust, that they should, out of the rents, issues, and produce of all or any part of the said real or personal estates, pay 250*l.* towards the maintenance of the testator's daughter until she should attain the age of twenty-one, or marry with the consent of the trustees; and, upon further trust, that they should pay and apply so much of the residue of the rents, &c., of the said estates as they should think necessary for the maintenance of the testator's son until he should attain the age of twenty-one, or his sister's marriage; and that, as soon as he had attained twenty-one, or his sister should be married, then that the trustees should raise 5000*l.* by mortgage, sale, or other disposition of all or any part of the testator's said real or personal estates, and stand possessed thereof, upon trust, to pay the same, and the interest thereon, to the testator's daughter when she should arrive at twenty-one, or marry; and subject to the payment of such sum, that the trustees should stand seised of the residue of the said real and personal estates in trust for the testator's son until he should attain the age of twenty-one, and then to the use of and in trust for the son, his heirs, executors, administrators, and assigns, for ever; but in case the son should not live to attain the age of twenty-one, and the daughter should be living at the time of his decease, or in case the son should live to attain twenty-one, and afterwards die without lawful issue, then the testator, as to his real estates, devised them to the use of the said trustees until the daughter should attain the age of twenty-one, or marry, and then to the use of his daughter for life, remainder to trustees to support contingent remainders, with divers remainders over. The daughter attained twenty-one, but the 5000*l.* had not been paid or raised out of the real estate; and the son had also attained the age of twenty-one.

The Court held, that the legal estate in the testator's real estates was in the trustees, and would continue until the 5000*l.* should be raised as directed by the will, and that the son would have taken an estate in fee in such estate, with an executory devise over in the event of his dying, without issue living at his death, in case the devise to him had been made without the intervention of trustees, he having attained the age of twenty-one.

DOE *d.* REES *v.* WILLIAMS, T. T. 1837. Ex. 2 *M. & W.* 749.

Under a devise to trustees, a re-conveyance cannot be presumed.

A TESTATOR devised his freehold to his wife in fee, and his leasehold estates to her during the lives of J. and S., and, if they should survive her, to her heirs. The wife devised, but without words of inheritance, all her property to trustees, on certain trusts, and also the lands she held under her husband's will, to pay an

annuity to D. She also gave a legacy to W., and certain yearly sums to two grand-nieces, until and during the period of apprenticeship; and, having appointed the trustees her executors, directed the residue of her real and personal estate, after payment of her debts, to be equally divided between her two grand-nieces. She died in 1799, and the grand-nieces entered into possession of the rents, &c., subject to the annuity to D. E. J., one of them, married, and in 1814 died, leaving a child, who also shortly after died, and upon her death the defendant entered into possession, and received the rents of her moiety. The annuity ceased to be payable in 1804, and the legacy to W. was paid in 1812. Upon ejectment, brought by the husband of E. J. for her moiety—

The Court held, that the fee passed under the will of the testatrix to the trustees, and that a re-conveyance could not be presumed; and that, as to the leasehold, the probability being that it was for lives, no title to recover a moiety was made out.

12. *Of Fee Farm Rents*.*

(*b*) Since the 1 Vict. c. 26.

1. *In general.* See, also, 1 Vict., c. 26, s. 3, ante, p. 641.

A general devise of lands to include copyhold, leasehold, and freehold.

By 1 Vict. c. 26, s. 26, it is enacted, "That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

2. *Fee Simple.*

A devise, without words of limitation, shall be construed to pass a fee.

By 1 Vict. c. 26, s. 28, it is enacted, "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

* Where a fee-farm rent was devised to several, and the plaintiff deduced his title to one-fourth by a deed operating under the Statute of Uses:—Held, that such an interest might be separated by will without the consent or attornment of the party, and that the tenant was liable to separate distresses by the devisors or cestuis que use; and semble, since the 4 Ann. c. 15, attornment being no longer necessary to the perfection of any grant, the form of conveyance would make no difference. (*Rivis* v. *Watson*, E. T. 1839, Ex., 5 M. & W. 255).

3. *Estate Tail.*

Devises of estates tail not to lapse.

By 1 Vict. c. 26, s. 32, it is enacted, "That where any person, to whom any real estate shall be devised for an estate in tail, or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

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4. *Copyholds.*

The 1 Vict. c. 26, s. 4, regulates the fine on copyholds in case of devise;

By 1 Vict. c. 26, s. 4, it is provided, "That where any real estate, of the nature of customary, freehold, or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled, or claiming to be entitled to such real estate, in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled, or claiming to be entitled, to the same real estate as aforesaid."

and s. 7, the entry on the court rolls.

By 1 Vict. c. 26, s. 5, it is enacted, "That when any real estate, of the nature of customary, freehold, or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor, or reputed manor, of which such estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declara-

tion of such trusts, but it shall be sufficient to state, in the entry on the court rolls, that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering or enforcing such fine, heriot, dues, duties, and services as he is now entitled to, for recovering and enforcing the same from or against the customary heir in case of a descent."

5. *Estates pur autre Vie.*

Estates pur autre vie of a freehold nature, if not provided for to be chargeable in the hands of the heir.

By 1 Vict. c. 24, s. 6, it is enacted, "That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

6. *Estate—Residue.*

The residue shall include lapsed or void devises.

By 1 Vict. c. 26, s. 25, it is enacted, "That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

7. *To Trustees and Executors.*

A devise to trustees or executors shall pass a fee, unless limited.

By 1 Vict. c. 26, s. 30, it is enacted, "That, where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

And where the trust is for the life of another, the trustees to take the fee.

By sect. 31, it is enacted, "That, where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will, in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

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8. *As to Gifts.*

A general gift to include estates over which testator has power of appointment.

By 1 Vict. c. 26, s. 27, it is enacted, "That a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Gifts to children or issue not to lapse.

By sect. 33, it is enacted, "That, where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

VI. RELATIVE TO, UNDER POWER OF APPOINTMENT.

(*a*) Before 1 Vict. c. 26. See, also, tit. *Power.*

Ward *v.* Swift, M. T. 1832. Ex. 1 *C. & M.* 171; S. C. 3 *Tyrw.* 122.

In executing a will under a power, the omission of the word "published" does not invalidate the will.

A power was given to appoint by will, to be duly executed and published under the hand and seal of the testatrix, in the presence of, and attested by, three or more credible witnesses; in pursuance of the power, an instrument was signed, sealed, and delivered as a last will and testament, concluding and attested as follows:—"In witness whereof, I have set my hand and seal hereto this fifth day of August,

1801, in the presence of the underwritten. Mary Swift, (L. S.) Signed, sealed and delivered this fifth day of August, 1801, as the last will and testament of the said testatrix, Mary Swift, by us, who in her presence, and in the presence of each other, have put our names as witnesses thereof."

The Court held the power well executed, although the word "published" was omitted.

(*b*) Since 1 Vict. c. 26.

By 1 Vict. c. 26, s. 10, it is enacted, "That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in execution of such power should be executed with some additional or other form of execution or solemnity."

Appointments to be executed like other wills.

VII. RELATIVE TO PAROL EVIDENCE, TO ADD TO, VARY, OR EXPLAIN.

Press *v.* Parker, H. T. 1825. C. P. 2 *Bing.* 456; S. C. 10 *Moore*, 158.

A testator devised to his eldest son, R. P., all his freehold messuage, wherein he then lived, with the yard, back estate, and premises thereto belonging: and to his eldest daughter, A. P., all his freehold front messuage, with the appurtenants, then in the occupation of one E., with a right of way and passage from the yard, and the use of the pump. A coal-cellar, within the boundary of the messuage occupied by E., had been always used by the testator, and was occupied by his eldest son after his death.

Evidence of the use of a cellar by the testator may be received to shew with what part of the property it was to pass *.

The Court held, first, that evidence of such occupation was admissible and conclusive, although it was proposed to shew that the cellar was situate within the boundary of the house devised to the testator's eldest daughter; and, secondly, that it passed to the son under the first clause of the will.

Doe *d.* Beach *v.* Earl of Jersey, H. T. 1825. K. B. 3 *B. & C.* 870.

Upon a devise of all my Briton Ferry estate, and afterwards, and all my Penline Castle estate, which, as well as my Briton Ferry estate,

So, account-books of stew-

* Bequest of a house to J., the son of George Gord, another to G., the son of George Gord, and another, upon the extinction of certain life estates, to George, the son of Gord; testator also bequeathed various legacies, and, inter alia, to John and George, the sons of George Gord, to be paid on attaining twenty-one: —Held, that parol evidence was admissible to shew the person he meant to designate by George Gord, the son of Gord. (*Doe* d. *Gord* v. *Needs*, M. T. 1836, Ex., 2 M. & W. 129).

A reference in a will to extrinsic facts, as part of the description of the subject devised, does not, if such facts, when proved, raise no ambiguity, authorize the entering into extrinsic evidence as to the intentions of the testator. (*Doe* d. *Templeman* v. *Martin*, E. T. 1833, K. B., 1 N. & M. 512).

ards may be used in evidence to identify the estate;

lies in the county of Glamorgan; and in certain deeds of lease and release upon the marriage of the devisor, and schedules annexed, purporting to contain an account of the several hereditaments comprehended in the estates of the devisor's father, there appeared, under the head of the "Brecon Estates," a parish called Lywell, in which was the messuage for which the ejectment was brought, and under the head of Glamorganshire estates, was a parish called Briton Ferry: at the trial the defendant offered in evidence account-books of former stewards of the devisor, and former owners of the lands devised, charging themselves with receipts of monies on account of such owners, amongst which was an entry, "Briton Ferry estate, in the county of Brecon;" and it was also in evidence that the lands in the declaration, together with the lands mentioned in the said schedules, had all gone by the name of the Briton Ferry estate, such of them as were in the county of Brecon extending over twelve parishes, and containing above 4000 acres.

Upon writ of error in D. P., the Judges, upon certain questions propounded to them, were of opinion that the expressions used in the will denoted an estate known to the devisor as the Briton Ferry estate, and not an estate locally situate in a parish or township; and consequently that being properly a question of parcel or no parcel, the evidence offered was admissible.

RICHARDSON *v.* WATSON, E. T. 1833. K. B. 1 *N. & M.* 567.

and parol evidence may be received to shew that the testator considered two closes as one.

THE words of a devise were as follows:—"I give and devise all that my messuage and tenements, closes, lands, and hereditaments, and real estate, situate, lying, and being in Kirton, in the county of Lincoln, which are in the occupation of Joseph Atkinson; and also the close in Kirton aforesaid, now in the occupation of John Watson, unto and to the use of my great-nephew, John Richardson." It appeared that John Watson was in the occupation of two closes, known by different names, and between which was a considerable intervening space. Evidence was offered of declarations of the testator, or rather of instructions given to his attorney, which were as follows:—"I also wish the farm in Joseph Atkinson's occupation to be the property of John Richardson, my great-nephew, taking also the land in Kirton, occupied at that time by Watson."

Per Cur.—It appears to us that there was a latent ambiguity which might have been explained; but the evidence which was received leaves it in as great an ambiguity as existed before. As neither the words nor the evidence adduced shew that by the close he meant to devise the two closes or one of them only, we think that the will is void for uncertainty. It is very clearly not a case of election.

DOE *d.* MORGAN *v.* MORGAN, M. T. 1832. EX. 1 *C. & M.* 235; S. C. 3 *Tyrw.* 119.

If the testator has two nephews named A., parol evidence may be given of the testator's intention as to which was intended.

A TESTATOR having two nephews named Morgan Morgan, one of whom only resided at Mothvey, gave certain premises after the decease of his wife, to his nephew, Morgan Morgan, and afterwards certain other premises "to Morgan Morgan, of the village of Mothvey"—

The Court held, that a latent ambiguity was raised sufficient to admit parol evidence in explanation.

DOE *d.* HISCOCKS *v.* HISCOCKS, T. T. 1839. Ex. 5 *M. & W.* 363.

A TESTATOR devised land to his "grandson, John H., eldest son of his son John." At the time of making the will, the testator's son John had issue, a son Simon, by a first marriage, and a son John (with others) by a second marriage. In an action of ejectment, brought by the grandson Simon against the grandson John—

The Court held, that evidence of the testator's intention in favour of one of the two parties, as disclosed by the instructions given to the attorney who prepared the will, and by certain declarations made afterwards, was inadmissible; but that it should be left to the jury to collect such intention from the terms of the will and surrounding circumstances alone.

But in a subsequent case it was held that parol evidence cannot be received to explain who was intended as the devisee.

PROVIS *v.* REED, E. T. 1829. C. P. 5 *Bing.* 435.

ON a writ of right, the demandant claimed the property in question as heir-at-law of one Henry Sara, who died seised thereof on the 31st of August, 1802. The tenant held as devisee under Sara's will. The demandants' pedigree and the seisin alleged in the count being admitted, the tenant commenced. To prove the execution of the will, one of the attesting witnesses (a Mrs. Bilkie) was called. She stated that it was executed by the testator in the presence of herself (the witness), and of the other witnesses, viz. Mr. Scott, the attorney who prepared the will, and a lady named Incledon, both of whom were since deceased. A witness named Rapson, a legatee under the will of Sara, was then called on the part of the demandants. He stated that the day after the death of Sara, the testator, he called at the office of Scott, the attorney, at Penryn, and requested to see the will; that Scott shewed it to him, saying, "There is an oversight: the will is not properly executed; but it is not of much consequence; we can manage it between ourselves;" that Scott then called Mrs. Incledon, his mother-in-law, into the office, and desired *her* to subscribe her name to the will, which she accordingly did. The demandants then offered in evidence certain alleged declarations made by the testator in his last illness. The witness Rapson deposed that he had the conducting of all the testator's affairs; that the testator, in his last illness, in conversation with him, said "that he wished him (Rapson) to be executor to a will that he proposed making;" whereupon one Wills, who was present, observed to him, "Have you not made a will already?" To which the testator answered, "Tom Reed (meaning the tenant) has been trying to get hold of my property; but neither he nor his ever shall have it. Scott drew up a paper, and they got me to sign it; but never fear, I know that it is not worth to Reed one farthing;" that, at another time, the testator said to Margaret Rowe (one of the demandants), "My land goes to my dear family; Peggy, remember the land is your's; if I do not live to make my will, when I am dead, see that you're righted." And that, shortly afterwards, the testator died. *Gaselee*, J., rejected these declarations; and—

The Court held, that parol evidence of declarations made by a testator in his last illness, tending to impeach his will, was not admissible.

And parol evidence of statements by a testator during his illness not admissible to impeach his will.

MILLER *v.* TRAVERS, M. T. 1831. C. P. 8 *Bing.* 244; S. C. 6 *M. & P.* 342.

So, parol evidence is not admissible to shew that testator intended to pass additional estates not named.

TESTATOR devised all his freehold and real estates, "situate in the county of L., and in the city of L.," having at the time a small real estate in the city of L., and none in the county of L., but considerable estates in the county of C.

The Court held, that it was not competent to the devisee to shew by parol evidence that the testator intended his estates in C. also to pass under the same devise, the devise having a certain operation, and the intention of the testator as to the estates in C. not being to be collected from the will itself without altering or adding to the words used in the will.

VIII. RELATIVE TO ALTERATIONS IN, SINCE 1 VICT. c. 26.

No alteration to be binding unless executed as a will.

BY 1 Vict. c. 26, s. 21, it is enacted, "That no obliteration, interlineation, or any alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alterations shall not be apparent, unless such alteration shall be executed in like manner as is hereinbefore required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator, and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

IX. RELATIVE TO CODICILS *.

(*a*) BEFORE 1 VICT. c. 26.

GUEST *v.* WILLASEY, T. T. 1826. C. P. 3 *Bing.* 614.

A subsequent codicil may operate as a republication of a former one.

A TESTATOR, after devising his C. estate to his son in fee, gave all his O. estate to N. S. and A. G., upon trust to sell the same, and appointed them his executors; he afterwards sold C. estate, and became seised of another called A., and afterwards signed a codicil to his will, attested by two witnesses only, stating that the money obtained for the C. estate, and to be obtained for the A. estate, which he directed to be sold, should be divided amongst all his children, and he appointed his wife executrix jointly with N. S. and A. G.; and by a second codicil, attested by two witnesses only, he, after stating that one-half of O. estate was sold, and giving directions as to the sale of the other half, appointed E. L. and J. F.

* A paper, in the nature of a codicil, but not attested so as to pass real estate, is not rendered effective as to real estate by a subsequent codicil properly attested, on a separate paper, containing no reference in terms to the unattested paper. (*Utterton* v. *Robins*, M. T. 1833, K. B., 2 N. & M. 819).

his executors in the place of N. S. and A. G.; and afterwards made a third codicil, duly attested for passing real estates, but merely appointing B. G. to be his executor in the room of E. L.; all the codicils were written on the back sheet of the will.

The Court held, that the third codicil operated as a republication of the first.

(*b*) Since 1 Vict. c. 26*.

X. RELATIVE TO THE REVOCATION AND REVIVAL OF.

(*a*) Before 1 Vict. c. 26.

Doe *d.* Reed *v.* Harris, H.T. 1838. Q. B. 8 *Ad. & E.* 1; S. C. 1 *N. & P.* 405.

Testator throwing a will into the fire, which was saved by the devisee when partially burnt, at which the testator was displeased, is a revocation†.

A testator threw his will on the fire, which was rescued from the flames by the devisee, so that, though the wrapper was partially burnt, the will was not affected by the fire, and the testator expressed his displeasure, but did not use any language declaring his intention to revoke his will. In ejectment by the heir-at-law, to recover copyhold property—

The Court held, that the jury were properly directed to say, whether what was then done by the testator was an actual intentional revocation of this will. At common law, a will might be revoked without

* By sect. 20, codicils must be executed as a will. See post, p. 692.

† To effect a cancellation "by burning the same," there must be a burning of some part of the instrument itself:—Held, that the burning a part of the cover was insufficient to effect a revocation. (*Doe* v. *Harris*, H. T. 1838, K. B., 1 N. & P. 405; S. C. 8 Ad. & E. 1, supra).

G. E. seised of the manor of M., amongst other estates, in fee, conveyed it to trustees and their heirs, to secure to his wife an annuity for life, and subject thereto to the use of himself in fee. G. E., by his will, duly executed to pass real estates, recited and confirmed that settlement, and then devised to J. E. (who died in testator's lifetime) and A. H. C., and their heirs, his freehold and copyhold estate in S., and his freehold estate at H., upon the following amongst other trusts: viz. in case there should be but one son of his daughter E. D. by her husband T. D., who should attain the age of twenty-one years, upon trust for such son, his heirs and assigns for ever; and in case there should be two or more sons of Mrs. D. who should attain the age of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there should be no son of Mrs. D. by the said T. D., who should live to attain the age of twenty-one years, then upon trust for such of the daughters (if any) of Mrs. D. by T. D., as should first attain the age of twenty-one years, or be married under that age with the consent of the trustees or trustee for the time being of that his will, and the heirs and assigns of such daughter for ever. After some pecuniary legacies, the testator proceeded as follows:—"And as to, for, and concerning all the rest, residue, and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, or over which I have a disposing power, whether the same consists wholly or in part of estates of freehold, copyhold, or for years, money in the funds, upon mortgage, or otherwise out upon security, or at interest, debts, or of what other nature the same, or any part thereof, may be, I give, devise, and bequeath the same unto the said J. E. and A. H. C., their heirs, &c., upon trust to sell and convert the same into money, to get in debts, &c., and out of the monies to be so raised, in the first place, to set apart 50,000*l.* three per cent. consols in trust for such son of Mrs. D., who, under the trusts of a settlement now intended to be forthwith made, shall become possessed of an estate tail in the manor of M., the residue to be divided amongst

any express declaration of a present intention to revoke, but by acts and conduct which manifested such intention; and, the jury having found it was a revocation, refused to interfere.

DOE *d.* SHELLEY *v.* EDLIN, H. T. 1836. K. B. 1 *N. & P.* 582.

Under a devise in trust to A. B. for life, if A. B. dies before the testator the

J. N. DEVISED to C. N. all his real estate, to hold to him and his heirs, upon special trust and confidence that C. N. should receive the rents, and apply the same to the uses of the testator's sister M. M. M. S. for life, and after her death upon further trust that he,

the other children of Mrs. D.; and the testator made J. E. and A. H. C. executors of his will. Some time after making his will, the testator drew a line across the direction to sell the property devised by the residuary clause; and, after making the will, the testator purchased a considerable freehold estate in W. and H. Testator afterwards made and published a codicil, duly executed to pass freehold estates, whereby, after reciting the rasure before-mentioned, and that he was apprehensive that such rasure not being witnessed might lead to litigation, he declared by that codicil that the sole intention of such rasure was to revoke that part only of the will whereby he directed the sale of his freehold property. It then proceeded: "And I do hereby direct and appoint that the son lawfully begotten of my daughter Mrs. D., who shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of E.; and I give and devise to the said son of my daughter, on his attaining the age of twenty-one years, and changing his name to E., all my freehold property, lands, tenements, and hereditaments, to have and to hold to him, his heirs and assigns, for ever." Testator then appointed a new executor in the room of J. E., then deceased, and did thereby ratify and confirm the aforementioned will and testament, except as before excepted. Testator died without again altering his will or codicil, leaving his widow and Mrs. D., his only child and heir-at-law, and heir according to the custom of the manors of which his copyhold estates were holden, and also his sole next of kin. At the death of testator Mr. and Mrs. D. had five children, one son and four daughters. Upon a case sent for the opinion of the Court of King's Bench:—Held, firstly, that the devise of the freehold part of the estate at S., and of the freehold farm and estate at H., contained in the will, was not revoked by the codicil; secondly, that the manor of M. did pass under the residuary devise contained in the testator's will, and that such devise was revoked by the codicil; thirdly, that the manor of M. *did* pass under the codicil to the first son of the plaintiff, Mrs. D., who shall attain twenty-one years, and change his name to E.; fourthly, that the estate in W. and A., purchased after the testator made his will, passed under the devise in the codicil to the first son of the plaintiff, Mrs. D., who shall attain twenty-one years and change his name to E.; fifthly, that the surplus rents and profits of the said copyhold estates at S., and of the said freehold farm at the same place, and of the freehold farm and estate at H., after providing for the maintenance of the devisee thereof, belonged to A. H. C., the surviving trustee, under the will of the testator, until a first son of the said plaintiff, Mrs. D., shall attain twenty-one years; or in failure of such son, till a daughter shall attain that age, or be married with consent, according to the will; sixthly, that the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by the codicil to the son of the plaintiff, Mrs. D., who shall first attain twenty-one years, and change his name to E., until such events take place, belong to A. H. C., the surviving trustee under the will of the testator. (*Duffield* v. *Elwes*, H. T. 1825, K. B., 3 B. & C. 705; S. C. 5 D. & R. 764).

Where a will, traced to the testator's possession, is not forthcoming at his decease, the presumption is, that he has destroyed it, and it must prevail, unless there be evidence to repel it by raising a higher probability to the contrary, and the onus lies on the party propounding the revoked will. (*Welch* v. *Phillips*, 1 Moore, P. C. 299).

Revocation of a will by marriage, and the birth of a child, (previous to the 1 Vict. c. 26), held to take place in consequence of a principle of law, independently of any question of intention of the testator himself, and consequently that no evidence is admissible to rebut the presumption of law; nor can the circumstances of after-acquired property descending upon the child have any effect. (*Marston* v. *Roe*, H. T. 1838, Q. B., 2 N. & P. 504, 615; S. C. 8 Ad. & E. 14).

the said C. N., should convey the said real estates to such uses, upon such trusts, and to and for such intents and purposes, &c., as she the said M. M. M. S., notwithstanding her coverture, by any deed, &c., should give, devise, and appoint. The testatrix made no further limitation of her estate. M. M. M. S., the testatrix's sister, died in the lifetime of the testatrix. C. N., the trustee, after the death of the testatrix, entered into possession, and after reciting the will of J. N., devised all the real estates, late of J. N., to T. J., his heirs, &c., to hold the same, or such part thereof to which no better title could be made, to his own use and benefit; but in case it should appear that the said J. N. left an heir-at-law, then to hold the same in trust to convey the said estates unto such heir, &c.

will is not revoked as the legal estate is in the trustees.

The Court held, first, that the death of the cestui que trust, M. M. M. S., in the lifetime of the testatrix was not a change in her family from which a revocation of the will could be implied; and secondly, notwithstanding the death of the cestui que trust in the lifetime of the testatrix, and consequently the object of the will having altogether failed, and become inoperative, yet that the legal estate vested in the trustee, and that the rule which applies to the devise of a legal estate does not apply to the devise of a trust estate so as to make it a lapsed devise; thirdly, that the words of the devise were so strong to convey the estate of inheritance, and the purposes of the trust making it necessary that the trustee to perform it should have such an estate, that the rule, which says the estate of the trustee shall be commensurate only with the trusts to be executed, could not apply to the present case so as to prevent the legal estate from vesting in the trustee under the will, and that his devisee, therefore, took the legal estate.

DOE *v.* EVANS, T. T. 1839. Q. B. 2 *P. & D.* 378.

A TESTATRIX, in 1819, devised the residue of her estates to L. E. for life, with remainder to his children in tail. L. E. died in 1821, leaving his wife pregnant with a daughter, the lessor of the plaintiff, who was born in 1822. The only son of L. E. died in 1825. In 1829, the testatrix, being aware of the death of the son, but ignorant of the birth and existence of the daughter of L. E., made a codicil, in which, after reciting that, by her will, she had devised her estates to L. E. for life, with remainder to his first and other daughters in tail, &c.; and that the said L. E. had departed this life without leaving any issue, she devised the estate in question to H. E. In 1831, two years previous to her death, the testatrix became aware that the daughter of L. E. was living, but she made no alteration in her will or codicil in consequence.

A codicil made under a mistake, and in ignorance of facts, is not a revocation.

The Court held, that this codicil did not revoke the will; and that the residue of the estates passed to the lessor of the plaintiff, the daughter of L. E.

(*b*) SINCE 1 VICT. C. 26.

By 1 Vict. c. 26, s. 18, it is enacted, "That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such ap-

Marriage revokes the will.

pointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions").

But no will revoked by presumption.

By sect. 19, it is enacted, "That no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

There must be another will or codicil executed like a will.

By sect. 20, it is enacted, "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

To revive a will it must be re-executed.

By sect. 22, it is enacted, "That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn."

XI. RELATIVE TO THE AVOIDANCE OF, SINCE 1 Vict. c. 26.

A devise not to be inoperative by any subsequent conveyance or act.

By 1 Vict. c. 26, s. 23, it is enacted, "That no conveyance or other act made or done subsequently to the execution of a will for or relating to any real or personal estate therein conveyed, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the *time* of his death."

XII. RELATIVE TO A DISCLAIMER. See, also, tit. *Disclaimer.*

Doe *d.* Smyth *v.* Smyth, M. T. 1826. K. B. 6 *B. & C.* 112.

A disclaimer must be of the land in question: but it is no disclaimer that the party claims under some other title.

In ejectment—

The Court said,—A devise vests the freehold in the devisee before entry. Co. Litt. 111. a. To divest this, there must be a disclaimer; but it was unnecessary to decide by what formal act the disclaimer should be manifested, or whether it must or must not be by deed. It was sufficient for them to decide that the disclaimer (by whatever mode) must be of the land in question. But, at all events, it is no disclaimer for a person to refuse taking under a devise, he giving as a reason that he claims the property in question under some other title. The disclaimer (whether it should be by deed or not) must be of the property devised.

XIII. RELATIVE TO FRAUDULENT DEVISES*.

FARLEY *v.* BRIANT, T. T. 1835. K. B. 5 *N. & M.* 42.

THE devisor covenanted in his lifetime for the payment of rent, and performance of other covenants, by a third person, and no breach occurred in his lifetime.

The Court held, that no action lay upon the statute of William & Mary against his devisee, upon breaches accruing after the devisor's death. The stat. 3 & 4 Will. & Mary, c. 14, against fraudulent devises, which gives a remedy by action against the devisees, only applies to those cases where the relation of debtor and creditor, in the common acceptation of those terms, existed between the devisor and the obligee or covenantee.

To constitute a fraudulent devise under the 3 Will. & M. c. 14, the relation of creditor and debtor must have existed between the creditor and the devisor in his lifetime.

XIV. RELATIVE TO WHEN DEVISEES TAKE TWO DEVISES UNDER SAME WILL†.

XV. RELATIVE TO THE REMEDIES AT LAW CONNECTED WITH.

(*a*) JURISDICTION OF THE COURTS OF COMMON LAW‡.

(*b*) PARTIES TO ACTIONS.

MORRANT *v.* GOUGH, T. T. 1827. K. B. 7 *B. & C.* 206; S. C. 1 *M. & Ry.* 41.

IN an action against a devisee, in trust, for the arrears of an annuity secured by an obligation of the testator, with a penalty binding his heirs, executors, and administrators, to be paid after the testator's decease, the defendant pleaded a devise to him, in trust for testator's son, T. S., for the purpose of maintaining such son until he should attain the age of twenty-one years, and that he should account with such son, on his attaining that age, for the profits of the estate; and that T. S., long before the exhibiting of the bill of the plaintiff, had died, whereupon his the said defendant's

Where the purpose for which trustees are appointed has been accomplished, the devisee, and not the trustees, should be sued.

* By 1 Will. 4, c. 47, devises of real estate are fraudulent and void, as against creditors of the testator, and a remedy is given to specialty creditors against the heirs and devisees jointly, or, if no heirs, against devisees solely, who shall be liable for false plea.

† A. devises lands to B. for life, remainder to the first and other sons of B. in tail male. After the death of A. and B., C., the first son of B., enters, suffers a recovery, and settles the property by a deed, to which Z. is an executing party, as trustee of a term, and thereby creates a power of incumbering. Z. afterwards devises other lands to E., the second son of C., in tail, with a limitation over, in case the land devised to A. in tail male shall descend to or devolve upon E. D., the eldest son of C., dying in his lifetime, E., upon the death of C., takes, subject to an incumbrance created under the power, the land devised by A.:—Held, by *Denman*, C. J., *Parke*, J., and *Patteson*, J., dissentiente *Taunton*, J., that E. is not incapacitated from holding both estates. (*Fazakerley* v. *Ford*, T. T. 1833, K. B., 2 N. & M. 1).

‡ It seems that, in a case sent from the Court of Chancery to the King's Bench, that Court will not give any opinion merely upon the construction of an equitable devise. (*Houston* v. *Hughes*, E. T. 1827, K. B., 6 B. & C. 403).

interest in the testator's estate ceased, and that all money which became due upon the account during the life of T. S. was paid; to which the plaintiff replied, a notice of the said bond, and that the rents, issues, and profits, &c., of the estate, arising and issuing thereout, during the time which elapsed between the death of the testator and of T. S., were more than sufficient to satisfy the plaintiff's debt, which was for subsequent arrears. Upon general demurrer—

The Court held, that the replication was bad, and that the action ought to have been against the party to whom the estate had passed on the ceasing of the interest of the defendant. In general, when the purposes for which an estate is held in trust have been answered, the interest of the trustees therein ceases.

(*c*) Evidence.

Doe *d.* Thorn *v.* Phillips, T. T. 1832. K. B. 3 *B. & Ad.* 753.

A deed under which a devisee claims may be evidence of the testator's seisin*.

Devise to the testator's brother and sister, and the survivor, for life; and, after their death, to A., B., and C., his daughters, share and share alike. Upon the death of the surviving tenant for life, C. continued to reside on the premises. A., another of the devisees, subsequently died, and devised his estate to his wife for life, and afterwards to his three daughters, after which E., described as heir-at-law of A., and the other two devisees, B. and C., covenanted to levy a fine to such uses as they should by deed appoint, and by deed, reciting that a fine had been levied, appointed the premises to P., who entered, and continued in possession when the action of ejectment was brought by one of the daughters of A., after the death of her mother—

The Court held, that, as against P., the deed under which he claimed was evidence of the seisin of A., at the time of his making his will and of his death; and that, independently thereof, the seisin of C., a co-tenant in common, being the seisin of A., there was no ground for presuming an ouster of him.

Doe *d.* Tatham *v.* Wright, H. T. 1836. K. B. 6 *N. & M.* 132.

Letters addressed to a party by persons since deceased, without going on to shew that the testator answered them: —Held inadmissible.

Amongst a variety of evidence to disprove imbecility and unsoundness of mind, one branch for that purpose consisted of various letters, of different dates, addressed to Mr. Marsden at different periods of his life, and written by persons of respectability, whose handwritings were proved, and who had been intimately acquainted with Mr. Marsden. These were found, with many others, after the death of Mr. Marsden, in a bureau in his library. The seals were broken, but no proof was given of any thing having been done by Mr. Marsden upon or in connexion with these letters. Upon an objection being made to their admissibility, *Gurney*, B., overruled it, and admitted them in evidence, stating, that a difference of

* Where the attorney of a devisee of lands, his client, held the will:—Held, that, being part of the muniments of his client, he was not bound to produce it, notwithstanding it was suggested to be a will of personalty also. (*Doe* v. *Jones*, 1836, N. P., 2 M. & Rob. 47).

opinion existed among the Judges in the Exchequer Chamber upon their admissibility. A verdict was found for the defendant, and a rule had been obtained to shew cause why that verdict should not be set aside, and a new trial had, on the ground of the improper admission of these letters as evidence.

The Court held, that letters addressed to a party by those who were well acquainted with him, and who are since deceased, found opened among other papers of the person to whom they were addressed, after his death, to which letters no answers were given, and upon which, or with reference to which, no act was done by the party to whom they were addressed, are not admissible in evidence, as treatment by the parties who wrote the letters, to prove the sanity of the party addressed.

(*d*) Finding of the jury*.

Windows.

See, also, tit. *Lights*, Vol. 4, p. 550.

Pringle *v.* Wernham, H. T. 1836. N. P. *7 C. & P.* 377.

In case for erecting an obstruction, and darkening the plaintiff's windows, it appeared that the defendant had erected a building, which was in height, from the ground to the ridge of it, twenty-nine feet nine inches, this building being directly opposite the windows in question. This building was to the height of seventeen feet nine inches from the ground, at a distance from the plaintiff's house of twenty-three feet and a half; but the roof of the building, which measured twelve feet from the bottom of it to the ridge, slanted back from the plaintiff's house about seven feet further.

To sustain an action for darkening the plaintiff's windows, the obstruction must be such as to injure the property in point of value†;

Lord *Denman*, C. J., told the jury, the question was, whether, in consequence of this building of the defendant's, the plaintiff had less light than before to so considerable a degree as to injure the plaintiff's property in point of value. To sustain this action there must have been a considerable obstruction of light, and the merely taking off a ray or two will not be sufficient. You will consider the evidence of the different witnesses on both sides, and say whether the

* On a question, whether certain property passed under a devise, the jury found that the premises were known by a certain name to the devisor "for divers, to wit, 50 years before the death of the devisor." The Court held the finding too loose and indefinite, as denoting neither a particular number of years, nor a period immediately preceding the death of the devisor. (*Doe* d. *Beach* v. *Earl Jersey*, H. T. 1825, K. B., 3 B. & C. 870).

† To support an action for obstructing lights, the plaintiff must shew that there was such a diminution of light and air as makes his premises less fit for occupation. If the light of the plaintiff's windows is obstructed by the defendant's building on a party wall, half of which belongs to the plaintiff and half to the defendant, the plaintiff may maintain either trespass or case. (*Wells* v. *Ody*, H. T. 1836, N. P., 7 C. & P. 410).

circumstances convince you that there has been a real diminution of the value of the plaintiff's house by this building of the defendant, and if so you will consider the amount of damages.

PARKER *v.* SMITH, M. T. 1832. N. P. 5 *C. & P.* 438.

as to make the premises less fit for the purposes of business or occupation,

IN case, it appeared that the plaintiff was possessed of a house, and that the defendants, who were the owners of the premises, situate very near, which had been injured by fire, had rebuilt them in such a way as to diminish, according to the plaintiff's opinion, the quantity of air and light which he enjoyed in the occupation of his house previous to such re-building. Several witnesses, on the part of the plaintiff, stated that, in their opinion, the quantity of light and air was diminished, and the premises in consequence depreciated in value.

Per Tindal, C. J.—The question in this case is, whether the plaintiff has the same enjoyment now which he used to have before of light and air in the occupation of his house,—whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible speculative exclusion of light which is the ground of an action; but that which the law recognises is such a diminution of light as really makes the premises, to a sensible degree, less fit for the purposes of business or occupation.

BACK *v.* STACEY, 1826. N. P. 2 *C. & P.* 465.

or not so comfortable, or so as to prevent the plaintiff carrying on his trade so beneficially.

ON an issue from the Court of Chancery, to try whether the plaintiff's windows had been obstructed or not, a great many witnesses, including several surveyors of eminence, were examined on both sides, and it was evident that the quantity of light previously enjoyed by the plaintiff had been diminished by the building in question. Under these circumstances, it was contended for the plaintiff, that he was, at all events, entitled to a verdict, any obstructions of ancient lights being wrongful and illegal.

Best, C. J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantive prevention of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.

Witnesses.

I. RELATIVE TO WHO ARE OR ARE NOT COMPETENT AS.

(*a*) In general.

1. *From Want of Understanding, and Effect of Blindness,* p. 701.
2. *From Interest.*
   1.—*Of the* 3 *&* 4 *Will.* 4, *c.* 42, p. 702.
   2.—*Of Parties to the Cause,* p. 703.
   3.—*Of Persons not Parties to the Cause,* p. 704.
3. *Effect of a Release,* p. 708.
4. *When Objection to Competency should be taken,* p. 708.
5. *Of the Mode of taking Advantage where an interested Witness has been examined,* p. 709.
6. *Of the* 6 *&* 7 *Vict. c.* 85, p. 710.

(*b*) In particular.

1. *As to Instruments.*

As to Annuities. See tit. *Annuity.*

As to Appraisements. See tit. *Appraisement.*

Connected with Apprentices. See tit. *Apprentice.*

As to Arbitration Contracts. See tits. *Arbitration and Award.*

As to Attornies. See tit. *Attorney.*

As to Bail-bonds. See tit. *Bail.*

As to Bills of Lading. See tit. *Lading, Bills of.*

As to Bills and Notes. See tit. *Bills and Notes.*

As to Bonds. See tit. *Bonds.*

As to Charter-Parties. See tit. *Charter-Party.*

As to Cheque. See tit. *Cheque.*

As to Composition-Deeds. See tit. *Composition-Deeds.*

As to Covenants. See tit. *Covenants.*

As to Deeds. See tit. *Deeds.*

As to East India Company's Contracts. See tit. *East India Company.*

As to Feoffments. See tits. *Feoffments.*

As to Frauds, Statute of. See tit. *Frauds, Statute of.*

I. RELATIVE TO WHO ARE OR ARE NOT COMPETENT AS—(*continued*).

As to Grants. See tit. *Grants.*

As to Guaranties. See tit. *Guaranties.*

As to Indemnity Bonds. See tit. *Indemnity.*

As to Insurance Policy Contracts. See tit. *Insurance.*

As to Leases. See tit. *Lease.*

As to Marriage Contracts. See tit. *Marriage.*

As to Mortgages. See tit. *Mortgage.*

As to Offices, Contracts relating to the Sale of. See tit. *Office.*

As to Partners and Partnership Contracts. See tit. *Partners and Partnership.*

As to Receipts. See tit. *Receipts.*

As to Ship and Shipping. See tit. *Ship and Shipping.*

As to Warranty. See tit. *Warranty.*

2. *As to Property.*

Real Property. See tits.

Covenant,
Fixtures,
Frauds, Statute of,
Inclosures,
Landlord and Tenant,
Lease,
Power,
Release,
Rent,
Repairs,
Replevin,
Use and Occupation.

Personal Property. See tits.

Accounting, Action for not,
Account stated,
Action,
Apothecary,
Apprentice,
Attorney,
Auction and Auctioneer,
Bail,
Bailment,
Banker,
Barrister,
Bastard,
Bills and Notes,
Carrier,
Cheque,
Composition with Creditors,
Contribution,
Copyright,
Corporation,
Debtor and Creditor,
Deceit,
Distress,
Ecclesiastical Persons,
Election,
Escape,
Executor and Administrator,
Fixtures,
Frauds, Statute of,
Freight,
Goods bargained and sold,
Goods sold and delivered,
Husband and Wife,
Indemnity,
Infant,
Innkeeper,
Insolvent Debtor,
Insurance,
Joint-stock Company,
Landlord and Tenant,
Legacy,
Lien,
Maintenance,
Marriage,
Master and Servant,

I. RELATIVE TO WHO ARE OR ARE NOT COMPETENT AS—(*continued*).

Money had and received,
Money lent,
Money paid,
Mortgage,
Officer,
Overseer,
Pardon,
Parent and Children,
Partner,
Party-wall,
Principal and Agent,
Printer,
Respondentia,
Reward,
Salvage,
Sheriff,
Ship and Shipping,
Smuggling,
Spirituous Liquors,
Stamps,
Surety and Principal,
Tithes,
Tolls,
Use and Occupation,
Usury,
Wager,
Work and Labour,
Warranty,
Waste.

3. *As to Services.*

Agents. See ante, tit. *Principal and Agent.*

Apothecary. See ante, tit. *Apothecary.*

Apprentices. See ante, tits. *Apprentice—Master and Servant.*

Arbitrators. See ante, tit. *Arbitration and Award.*

Attorney. See ante, tit. *Attorney.*

Auctioneers. See ante, tit. *Auction and Auctioneer.*

Bail. See ante, tit. *Bail.*

Brokers. See ante, tit. *Principal and Agent.*

Carrier. See ante, tit. *Carrier.*

Counsel. See ante, tit. *Barristers.*

Executors and Administrators. See ante, tit. *Executor and Administrator.*

Factor. See ante, tit. *Principal and Agent.*

Guarantie. See ante, tit. *Guarantie.*

Husband and Wife. See ante, tit. *Husband and Wife.*

Infants. See ante, tit. *Infant.*

Mechanics. See post, tits. *Master and Servant, Work and Labour.*

Messengers under Commission of Bankrupt. See ante, tit. *Bankrupt.*

Parish Officers. See ante, tits. *Churchwardens—Overseers—Parish Officers.*

Partners. See ante, tit. *Partner and Partnership.*

4. *As to Individuals.*

Agents. See tit. *Principal and Agent.*

Aliens. See tit. *Alien.*

I. RELATIVE TO WHO ARE OR ARE NOT COMPETENT AS—(*continued*).

Assignees. See tits. *Bankrupt—Bond—Covenant—Debtor and Creditor—Deed—Insolvent Debtors—Lease—Reversion—Way, Right of.*

Auctioneers. See tit. *Auction and Auctioneer.*

Bankrupts. See tit. *Bankrupt.*

Bastard. See tit. *Bastard.*

Brokers. See tit. *Principal and Agent.*

Churchwardens. See tit. *Churchwardens.*

Clergymen. See tit. *Ecclesiastical Persons.*

Commissioners. See tits. *Bankrupt — Customs and Excise—Inclosure—Insolvent Debtor.*

Duress, Persons under. See tit. *Duress.*

Executors and Administrators. See tit. *Executor and Administrator.*

Feme Covert. See tit. *Husband and Wife.*

Gamblers. See tit. *Gaming.*

Husband and Wife. See tit. *Husband and Wife.*

Idiots. See tit. *Idiots.*

Infants. See tit. *Infants.*

Lunatics. See tit. *Lunatics.*

Outlaw. See tit. *Outlawry.*

Overseers. See tit. *Overseer.*

Partners. See tit. *Partners and Partnership.*

Servants. See tits. *Master and Servant—Principal and Agent.*

Smugglers. See tit. *Smuggling.*

Stockjobbers. See tit. *Stockjobbing.*

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II. RELATIVE TO THE ATTENDANCE OF.

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(*b*) Subpœna, p. 711.

(*c*) Habeas corpus, p. 711.

(*d*) Before justice of the peace, p. 711.

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1. *Action for.*

1.—*When maintainable,* p. 711.

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III. RELATIVE TO WHAT A WITNESS MAY DO WITHOUT BEING SWORN, p. 721.

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V. RELATIVE TO THE EXAMINATION OF.

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VIII. RELATIVE TO THE COMMITTAL AND PRIVILEGES OF, p. 746.

IX. RELATIVE TO CRIMINAL PROCEEDINGS, p. 746.

I. RELATIVE TO WHO ARE OR ARE NOT COMPETENT AS.

(*a*) In general.

1. *From Want of Understanding, and Effect of Blindness.*

Rex *v.* Williams, 1835. N. P. 7 *C. & P.* 320.

On an indictment for murder, a daughter of the deceased and of the prisoner, aged eight years, was called as a witness; and on her

Before a child can be examined,

the Judge will ascertain that it understands the nature of an oath.

examination by *Patteson*, J., it appeared that, before the death of the deceased, which took place about fifteen weeks before the trial, (the death being on the 3rd of April, and the trial on the 23rd of July), the witness never heard of God, nor of a future state of rewards and punishments; and that she never prayed, nor knew the nature of an oath; but that, since the death of the deceased, she had been visited twice by a reverend gentleman, who had given her some instructions as to the nature and obligation of an oath.

Per Patteson, J.—I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purposes of this trial.

CRONK *v.* FRITH, M. T. 1839. N. P. *9 C. & P.* 197; S. C. *2 M. & Rob.* 262.

An attesting witness, though blind, should be called.

IN an action on a bond, it appeared that, since the execution of the bond, one Cundwell, the subscribing witness to it, had become blind, and the plaintiff therefore proposed to prove it in the same way as if the witness were dead.

Lord *Abinger*, C. B.—I am decidedly of opinion that the bond cannot be read without calling the subscribing witness. He might, from his recollection of the transaction, give most important information respecting it.

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2. *From Interest.*

1.—*Of the* 3 & 4 *Will.* 4, *c.* 42.

By the 3 & 4 Will. 4, c. 42, a witness interested solely on account of the verdict is competent.

BY the 3 & 4 Will. 4, c. 42, s. 26, in order to render the rejection of witnesses on the ground of interest less frequent, it is enacted, "That if any witness be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him.

Sect. 27 directs when the name of the witness is to be indorsed on the record.

BY sect. 27, it is enacted, "That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

FAITH *v.* M'INTYRE, H. T. 1835. N. P. 7 *C. & P.* 44.

The drawer of an accommodation bill is within the statute.

IN an action by the indorsee against the acceptor of a bill of exchange, alleged to be an accommodation bill, the drawer was called as a witness for the defendant—

Parke, B., allowed him to be examined under the stat. 3 & 4 Will. 4, c. 42, s. 27, his name having been indorsed on the postea under the provisions of that statute.

2.—*Of Parties to the Cause.*

WORRALL *v.* JONES, H. T. 1831. C. P. 7 *Bing.* 395.

A co-defendant who suffers judgment by default, if he consents, may be a witness for the plaintiff,

THIS was an action of debt on a bond conditioned for the payment of rent and performance of agreements by Edward Jones. Two of the defendants, viz. John Jones and Edward Jones, suffered judgment by default. The defendant, Baker, pleaded in bar that the tenancy ceased on a particular day, up to which period all rent had been paid by Edward Jones. Edward Jones was called as a witness, on the part of the plaintiff, to prove the continuance of the tenancy. The witness himself did not object to be examined; but on the part of the defendant, Baker, it was contended that Edward Jones, being a party to the record, was not a competent witness. *Bosanquet*, J., however, admitted the evidence, subject to the opinion of the Court; and the jury found for the plaintiff.

Per Cur.—At the trial of this issue the plaintiff proposed to call Edward Jones as a witness, to prove the continuance of the ancient tenancy. No objection could arise on the ground that Edward Jones was interested to procure a verdict for the plaintiff who called him, inasmuch as, being the principal debtor, he could not call for contribution from the other defendants, but must himself be ultimately liable both to the damages and costs recovered in this action. The witness did not himself object to be examined, but an objection was made on the part of William Baker, one defendant, who had pleaded; and the question reserved for our consideration is, whether a defendant, who has suffered judgment by default, and who consents to be examined, is an admissible witness, where he has no interest in the event of the suit; and the only objection to his admissibility is this, that he is a party upon the record; and upon this question we are of opinion that the evidence was admissible. No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit: on the contrary, many may be brought forward in which parties to the suit, who have suffered judgment by default, have been admitted witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not; and the omission or rejection of the witness has depended on the result of this inquiry. The exclusion on the ground of interest is a known principle of the law of evidence; and so much did Lord Chief Baron Gilbert consider this as the only solid objection against the evidence of a party to the suit, that no man interested in the matter in question can be a witness for himself, that he states that several corollaries may be deduced from this rule, of which he gives us the

first,—"That the plaintiff or defendant cannot be a witness in his own cause; for those are the persons who have a most immediate interest, and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it." (Gilbert, Ev., 4th ed. p. 130). That a party to the record should not be compelled, against his will, to become a witness in a court of law, is a rule founded on good sense and sound policy. It forms the point of the decision in the case of *The King* v. *Woburn*, (10 East, 395); and the decision of that case leads to the necessary inference, that, if the party consents to be examined, he is then an admissible witness. We think, therefore, where the party to the suit, who has suffered judgment by default, waives the objection, and consents to be examined, and is called against his own interest, there is no ground, either on principle or authority, for rejecting him.

COLLEY *v.* SMITH, H. T. 1838. C. P. 4 *Bing. N. S.* 285; S. C. 6 *D. P. C.* 399.

and may be called on to produce a deed.

THERE were four defendants, three of whom had suffered judgment by default.

The Court held, that they might be required, by subpœna, to produce a deed of partnership under which all four were acting with the plaintiff in the matters which gave rise to the action; but would not make an order requiring them to produce the deed.

3.—*Of Persons not Parties to the Cause.*

EDMONDS *v.* LOWE, T. T. 1828. K. B. 8 *B. & C.* 407.

A witness, who would be answerable over to the defendant, is incompetent*;

IN an action on a bill of exchange, the defence was, that the plaintiff had not given any consideration for the bill, and kept it against good faith. The facts in support of this, as opened by the defendant's counsel, were, that the bill was drawn and accepted on account of a debt due from the acceptor to the drawer; that Bewzeville, the acceptor, with the consent of the defendant, (the drawer and indorser), took the bill for the purpose of getting it discounted for the defendant, and engaged to the defendant that he (Bewzeville) would provide for it when due; that Bewzeville, with this view, took

* A witness called for the defendant stated, on the voir dire, that he was bail to the sheriff in the action, but did not justify, and that he had not done anything to get the recognizance he had entered into discharged. He added, that another bail justified; but it appeared that he did not see him do so:—Held, that he was not a competent witness. (*Hawkins* v. *Inwood*, M. T. 1829, N. P., 4 C. & P. 148). If, at a trial, it be discovered that a witness for the defence is one of the bail, and therefore incompetent, the Judge, at the trial, will, on the defendant's depositing a sufficient sum with the associate, make an order for striking the witness's name out of the bail-piece, so as to render him a competent witness. (*Bailey* v. *Hole*, H. T. 1829, N. P., 3 C. & P. 560).

Where the plaintiff's agent had given security for the costs of the action, the Court allowed him to be examined, upon depositing with the officer of the Court the amount of the security given. (*Lees* v. *Smith*, 1838, N. P., 2 M. & Rob. 329).

A witness, being solicitor to a commission, and being subpœnaed to produce the proceedings, with a view to prove an admission by the defendant, and demurring to the production, on the ground that his clients might be injured, and that he was the confidential depositary of the proceedings by the assignees, his clients,—the objection was allowed. (*Laing* v. *Barclay*, 1820, N. P., 3 Stark. 42).

it to the plaintiff, and asked him to discount it, but that the plaintiff, as soon as he got possession of it, refused to discount or return it, and said he would keep it as a security for a debt of 70*l.*, which was previously due to him from Bewzeville. To prove this case, Bewzeville was called. The plaintiff's counsel contended that he, being the acceptor of the bill, was not in this action a competent witness. Lord *Tenterden*, C. J., was of this opinion; and accordingly, the defendant's case not being proved, the plaintiff obtained a verdict, but he took it only for 70*l.*, the amount of the debt due to him from Bewzeville. On motion for a new trial—

Per Cur.—We are of opinion that the witness was properly rejected. He was the acceptor of a bill of exchange drawn upon him by Lowe, and thereby guaranteed to Lowe that the bill should be paid by himself. Now, this was an implied contract to indemnify Lowe from all costs and charges which he might be put to by reason of the non-payment of the bill; and therefore, if the verdict were found against the drawer, he would be answerable to him for the costs of that action. It has been said, however, that we are to consider this as analogous to the cases where agents and carriers are admitted without a release; but we do not think the cases similar. The agents to whom the exception in the law of evidence applies are agents in the ordinary course of trade and commerce. They are, in general, the only witnesses of the bargains and dealings which take place; and unless they were allowed to give evidence of those dealings, commerce could not go on; but Bewzeville was not such an agent. The whole transaction arises out of the accidental circumstance of his being the acceptor of the bill. We are of opinion, however, that, upon payment of costs, a new trial should be had, in order to give the defendant an opportunity of releasing Bewzeville, and shewing what passed between the plaintiff and him when he took the bill to be discounted.

BLACKETT *v.* WEIR, E. T. 1826. K. B. 5 *B. & C.* 385; S. C. 8 *D. & R.* 142.

but a party, though jointly liable with the defendant, is a competent witness for the plaintiff.

ASSUMPSIT for coals supplied for the service of a steam-packet. The action was, substantially, against several persons, who had formed a joint-stock company; but, in form, it was against one only, who did not plead the non-joinder of the others in abatement, and had chosen to go to trial on the general issue. There was no dispute about the cause of action. The plaintiff then, in order to shew that the defendant was one of the company, and therefore liable, called a witness, one Gilson, who admitted that he was himself one of them. The defendant's counsel thereupon objected to him as being incompetent, he having an interest in the event of the suit. *Bayley*, J., overruled the objection, received him as a witness, and the plaintiff obtained a verdict. A rule having been obtained to set it aside—

Per Cur.—We are of opinion that the evidence of the witness has been properly received. The distinction in the cases of *Bland* v. *Anslay* (2 N. R. 331), *Brown* v. *Brown* (4 Taunt. 752), *Mant* v. *Mainwaring* (8 Taunt. 139), was, that in the last instance the party was on the record, and in each of the others he was not, and it was a general rule that the parties on the record could not be witnesses; but, on the ground of interest, (upon which it was said this

witness was incompetent), it was clear that any bias on his mind must have been against the party in support of whose claim he was called; he would be immediately liable over to the defendant for contribution. The case here was very strong in favour of the competency on that very account; for, in cases of joint contract, one joint contractor had the remedy over for contribution against the other, but in cases of joint trespass there was no such remedy; and yet a joint trespasser, who was not on the record, was allowed to be a witness against those who were.—Rule discharged.

SLEGG *v.* PHILLIPS, E. T. 1836. K. B. 6 *N. & M.* 360; S. C. 4 *Ad. & E.* 852.

In an action against one of several joint makers of a note, another is not competent to prove the consideration illegal*.

ASSUMPSIT on a promissory note delivered to the plaintiff by the defendant; plea, that the note was given upon an illegal consideration. It appeared that the note in question was a joint and several promissory note made by the defendant and a person of the name of Crippen, who was called by the defendant as a witness, with a view of shewing that the consideration of the note was illegal under 7 Geo. 2, c. 8, the note having been given to secure to the plaintiff a sum of money advanced to him by the defendant and Crippin, and which sum of money was applied by them in paying losses on time bargains. This witness being objected to, *Denman*, C. J., thought he was incompetent to prove any such matter, and a verdict was found for the plaintiff for 128*l*. A rule had been obtained, calling on the plaintiff to shew cause why that verdict should not be set aside, and a new trial had, on the ground that this witness was improperly excluded from giving his testimony.

Per Cur.—We think the testimony of this witness was rightly rejected. The plea which the witness was called to prove states the illegality of the note, and the witness is not called, as in the other cases, to prove the joint liability. It is quite clear, that if the plaintiff recovered against the defendant in this action, the defendant might sue the witness for contribution. We grant, if the witness had already paid all that the present defendant could recover by way of contribution, he would have ceased to be interested; but he has not paid all he would be liable for the amount of interest due. Although this judgment would not avail in an action against the witness, we cannot help seeing that, if this were to be held a good witness, when an action was brought against him, the present defendant would be called to prove the same fact. In *Hall* v. *Cecil*, (6 Bing. 181), the Court thought that one of two joint-contractors had a direct interest to defeat the action, and lessen the damages.

PAGE *v.* THOMAS, T. T. 1840. Ex. 6 *M. & W.* 733.

But in an action by the payee of a note against

ASSUMPSIT by the payee against the maker of a joint and several promissory note; plea, that the defendant did not make the note. The promissory note, on being produced, bore the signatures

* In an action against the drawer of a bill, payable to his own order, but for the accommodation of the first indorsee, since become bankrupt:—Held, that the latter was a competent witness to prove notice to the defendant of the dishonour, as coming to speak against his own interest; but that the defendant could not be deemed a person, surety, or liable for a debt of the bankrupt within the 49 Geo. 3, c. 121, s. 8, so as to be barred by the certificate. (*Mayer* v. *Meakin*, 1819, N. P., 1 Gow, 183).

of Stephen Thomas, J. A. Allen, and J. Jenkins, which two latter were proved to be sureties; Jenkins was then called to prove the signature of "Stephen Thomas" to be in the defendant's handwriting, and was objected to on the part of the defendant as an incompetent witness. *Maule*, B., overruled the objection, and the plaintiff had a verdict for the amount of the note. There being no other evidence of the defendant's handwriting, the learned Judge reserved leave to the defendant to move to enter a nonsuit if the Court should be of opinion that the surety was incompetent to prove the defendant's handwriting. On motion for a nonsuit—

one of several makers, the others, being sureties thereof, are competent witnesses for plaintiff.

Per Cur.—In actions by the indorsees of bills against the acceptors, the drawers and indorsers are constantly called as witnesses against the acceptor, (see Bayley on Bills, 5th ed. 536), and yet it might be urged that they have an interest in making the acceptor pay the bills; that rule governs the present case, and, therefore, the rule for a nonsuit must be discharged.

MARSDEN *v.* STANSFIELD, H. T. 1828. K. B. 7 *B. & C.* 815; S. C. 1 *M. & Ry.* 669.

THIS was an issue directed by the King's Bench for the purpose of trying whether a certain messuage or tenement, with the lands and appurtenances thereunto belonging, commonly called or known by the name of Hill Barn, in the occupation of the said defendant, or any part thereof, is situate within the chapelry of Littleborough, in the county palatine of Lancaster, and the bounds and limits thereof, the said plaintiffs thereupon maintaining the affirmative, and the defendant the negative. Upon the trial, one James Cryer, then occupying rateable property in the said chapelry of Littleborough, was called as a witness on behalf of the plaintiffs, and, after an objection made to his competency by the defendant's counsel, was admitted. The questions for the opinion of the Court were, first, whether the said James Cryer was a competent witness on this issue under the above circumstances; secondly, if he was incompetent at common law, whether such incompetency were not removed by 54 Geo. 3, c. 170, s. 9, which enacts, "That no inhabitant or person rated, or liable to be rated, to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any Court, or person or persons whatsoever, be deemed and taken to be, by reason thereof, an incompetent witness for or against such district, township, or hamlet in any matter relating to such rates or cesses, or to the boundary between such district, parish, township, or hamlet, or to any order of removal to or from such district, parish, township, or hamlet, or the settlement of any pauper in such district, parish, township, or hamlet, or touching any bastards chargeable, or likely to become chargeable, to such district, parish, township, or hamlet, or the recovery of any sum or sums for the charges of maintenance of such bastards, or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet, any law, usage, statute, or custom to the contrary in any wise notwithstanding."

A rated inhabitant is competent on a question of locality.

The Court held, first, that, upon an issue whether a tenement, which has been rated to a chapel-rate, is situate within the chapelry,

a person occupying rateable property in that chapelry is a competent witness to prove the affirmative at common law; and, secondly, by Mr. Justice *Bayley* and Mr. Justice *Holroyd*, (Mr. Justice *Littledale* dubitante), that such witness is also competent under the stat. 54 Geo. 3, c. 170, s. 9.

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3. *Effect of a Release.*

DOE *d.* DULLY *v.* ALLBUTT, 1833. N. P. 6 *C. & P.* 131.

A witness, who has agreed to pay the attorney his costs, is competent if released.

A WITNESS called for the lessor of the plaintiff was objected to, as he had made himself liable to pay the attorney of the lessor of the plaintiff. The attorney executed a release, discharging the witness from "all fees, costs, and charges."

Gurney, B.—I think it is sufficient. All claims must, under such circumstances as these, be made up of fees, costs, and charges.

LANNESS *v.* ROWE, T. T. 1839. Q. B. 2 *P. & D.* 538.

The release need not be produced.

ASSUMPSIT by the indorsee of a bill of exchange against the acceptor; plea, that the bill was drawn by one James Smith, and accepted by the defendant, for the accommodation of James Smith. James Smith was called by the defendant as his witness, and, upon an objection being taken to his competency, stated that he had been released; that he had not read the release, but that it was in the hands of the defendant's attorney. The release was then called for by the plaintiff's counsel, and not produced. Upon this, it was contended for the plaintiff, that the release being the best evidence, and not being forthcoming, the witness could not be examined. Lord *Denman*, C. J., overruled the objection, and the defendant had a verdict; leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bill and interest. A rule for this purpose having been obtained—

Per Cur.—The question is, if a witness, who is primâ facie incompetent, can get rid of his incompetency by stating generally that he has been released, we think he may, and that the objection to his competency is removed.

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4. *When Objection to Competency should be taken.*

DEWDENEY *v.* PALMER, H. T. 1839. Ex. 4 *M. & W.* 664; S. C. 7 *D. P. C.* 177.

The incompetency of a witness should be objected to on the *voir dire* *.

A WITNESS was called and sworn on behalf of the plaintiff as James Dewdeney; he was recognised, however, as George Dewdeney, the plaintiff, upon which it was proposed to shew that he was the real plaintiff, and the defendant was about to call evidence to that fact, but it being objected that that was not one of the issues to be

* Where a witness has been called, and, after he has been dismissed by the party calling him, it is discovered, from private information, that the witness is incompetent from interest, and the party, for whom he appears, recalls him merely to inquire as to the existence of his interest, the objection to the incompetency will not be allowed to prevail. (*Fellingham* v. *Sparrow*, M. T. 1840, B. C., 9 D. P. C. 141).

tried, *Gurney*, Baron, refused to receive the evidence, and the plaintiff had a verdict.

Per Cur.—The regular way, though, in some instances, the strict course may have been improperly departed from, was, for defendant to have made this objection on the voir dire, when other evidence might have been called, if necessary, to prove the incompetency; and then, if the incompetency had been established, an opportunity would have been afforded of proving the case by other evidence.—Rule refused.

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5. *Of the Mode of taking Advantage where an interested Witness has been examined.*

BELL *v.* SMITH, H. T. 1826. K. B. 5 *B. & C.* 188.

If a witness, interested in the result of a suit, be examined, a venire de novo will be awarded.

IN an action on a policy of assurance, it appeared that the policy was effected by the plaintiffs merely as agents for those who should appear to be insured in the ship and goods insured. At the trial, the plaintiff called, as a witness, Andrew Arnett, the captain of the ship, who was to prove most of the facts necessary to charge the defendant, one of the underwriters. Being examined on the voir dire, he admitted that he, at the time of effecting the assurance, and of the subsequent loss, had an interest in the ship and goods, for the loss of which that action was brought. The defendant's counsel then objected to him, as being incompetent on the ground of interest.

Per Cur.—We are of opinion that Arnett was not, in the present case, a competent witness. There can be no doubt that he was, originally at least, the substantial plaintiff in the suit; and we are not to be very astute to find, and to give effect to methods found by others, of making the real plaintiff in the suit a witness for the recovery of that which is the subject of it. The action having been brought for the benefit of him and the other person interested in the goods, although in the name of the broker who had effected the policy, it will and must be presumed, until the contrary is proved, that the action is brought by him, and by his authority. We cannot presume the action to be brought by the authority of persons having no interest in the subject-matter of the suit, rather than by the authority of those who have an interest in the subject-matter. Thus, if the action was brought by him, and under his authority, whether expressly given to the attorney, or whether impliedly given, will make no difference. If the action is to be considered as brought under his authority, nothing has been since done which can deprive the attorney, who has brought the action, of his right to recover his costs against Arnett, as much as against the other person interested. The machinery, notwithstanding all the contrivance which has been adopted, has left him to that extent, at least, liable, if he was liable in the first instance, to another party, or whoever he was that commenced this action. Nothing has been done by which his responsibility is destroyed. We decide on that ground, and on that ground alone; for it seems to us, that it is sufficient to warrant us in saying, and to call upon us to say, that Arnett had an interest in taking care that the verdict should pass for the plaintiff, and that, of course, he is not competent to be a witness. Let there be a venire de novo.

6. *Of the 6 & 7 Vict. c. 85.*

By 6 & 7 Vict. c. 85, no witness is to be incompetent on account of crime or interest.

By 6 & 7 Vict. c. 85, after reciting that the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment upon the credit of the witnesses adduced, and on the truth of their testimony, it is enacted by sect. 1. "That no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by depositions, according to the practice of the Court, on the trial of any issue joined, or of any matter in question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided also, that this act shall not repeal any provision in a certain act, 7 Will. 4 & 1 Vict. c. 26, intituled 'An Act for the Amendment of the Laws with respect to Wills;' provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters, or any of the matters, in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

II. RELATIVE TO THE ATTENDANCE OF.

(*a*) Power of the court to order.

M'Dougall *v.* Nicholls, T. T. 1835. B. C. 4 *D. P. C.* 76.

The Court cannot order a witness to appear before the Master.

On motion to compel a witness to give evidence before the Master—

Coleridge, J.—It does not appear to me that I have power to compel a witness to attend.

(*c*) Of the subpœna.

Wilson *v.* Day, H. T. 1829. C. P. 3 *M. & P.* 333.

The subpœna should state in the body where the cause is to be tried.

On motion for an attachment—

The Court held, that a subpœna, in order to bring a party into contempt for non-attendance under it, must have inserted in the body of it the place where the cause is intended to be tried, if at the sittings in London or Middlesex.

Maunsell *v.* Ainsworth, M. T. 1834. Ex. 8 *D. P. C.* 869.

Whether a subpœna is served in a reasonable time depends on the circumstances*.

The defendant was served at twelve o'clock while standing on the steps of the court-house, and was told that the trial would come on the same day, which it did at five o'clock. It was objected, on the part of the defendant, that the service was insufficient; but *Rolfe*, Baron, considered that there was evidence to go to the jury, that the service had been made within a reasonable time.

Per Cur.—There is no doubt that the witness must be served with a subpœna within a reasonable time; but what constitutes a reasonable time varies according to the circumstances of each particular case. Here the evidence plainly shews that the service was within a reasonable time.

(*c*) Habeas corpus. See tit. *Habeas Corpus.*

(*d*) Before justices. See tit. *Justice of the Peace.*

(*e*) Before commissioners of bankrupt. See tit. *Bankrupt.*

(*f*) Before arbitrators. See tit. *Arbitration.*

(*g*) Non-attendance of.

1. *Action for.*

1.—*When maintainable.*

Lamont *v.* Crook, T. T. 1840. Ex. 6 *M. & W.* 615; S. C. 8 *D. P. C.* 737.

The witness may be liable though not called on his subpœna†.

In an action on the case for not obeying a writ of subpœna ad testificandum, the plaintiff's counsel stated, that the defendant had been duly served with a subpœna ad testificandum, requiring him, in the usual form, to attend and give evidence for the plaintiffs, in a

* Difficulty in serving a subpœna will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service. (*Barnes* v. *Williams*, M. T. 1832, Ex., 1 D. P. C. 615).

† The counsel for the plaintiff has a right, on the cause being called on, to have a witness called on his subpœna, without swearing the jury. (*Hopper* v. *Smith*, M. T. 1827, N. P., 1 M. & M. 115).

It is not indispensably necessary that, when a witness is called on his subpœna,

cause in which they were the plaintiffs, and one Robert Southall was the defendant, and then admitting that the defendant had not in fact been called upon the subpœna, proposed to prove, by satisfactory evidence, that when the cause was called on the defendant was not present, and that, in consequence thereof, the record was withdrawn. Lord *Abinger*, C. B., being of opinion, that, as the defendant had not been called on his subpœna, the action could not be sustained, no evidence was adduced, and the plaintiffs were nonsuited. On motion to set the nonsuit aside—

Per Cur.—The writ of subpœna commands the party to be in attendance on a certain day, and from day to day, until the cause is tried; so far, however, as the party suing it out is concerned, the only obligation it imposes on the witness is, to be present, and forthcoming when wanted to give evidence in the cause for which he was summoned; that is to say, at the time when his presence is required by the counsel who conducts the cause. *Mullett* v. *Hunt* (1 C. & M. 752, infra) decided, that, if it is clear that the witness cannot be forthcoming when his evidence was required, the plaintiff may withdraw the record, and may maintain an action against him, though the jury have not been sworn. In that decision we concur. We consider it sufficient for the plaintiff to shew the absence of the witness under such circumstances, that when the time would have arrived for him to give evidence he could not have been present. The question then is, how is this to be proved? Must it be shewn that he was called on the subpœna? and is no other evidence to be admissible for that purpose? No doubt it would have been exceedingly good evidence to establish the fact of his absence, but it seems to us that it is not the only evidence; for if a party were shewn to have been 200 miles distant from the assize town during the whole time of the assizes, surely that would be sufficient. The practice of calling a witness on his subpœna is entirely a matter of caution, and, though very useful for the purpose of shewing the absence of a witness, is not the only kind of evidence by which it may be substantiated. For these reasons, we think this rule ought to be made absolute for a new trial.

MULLETT *v.* HUNT, T. T. 1833. Ex. 1 *C. & M.* 752; S. C. 8 *Tyrw.* 875.

An action lies for not obeying a subpœna, although another person would have proved the same fact, if the plaintiff has to withdraw the record.

A WITNESS was subpœnaed, in an action for use and occupation, to give evidence as to the use and occupation, and also to rebut a set-off expected to be relied on by the defendant. When the cause was called on, the counsel on both sides were absent, but the attorney for the plaintiff proved he could have handed over a draft brief to other counsel, and swore that he withdrew the record solely on account of the absence of the witness, although another witness could have proved the use and occupation.

The Court held, that the action was maintainable against the wit-

the officer of the Court should hold the writ in his hand; it is sufficient that the writ should be exhibited in the Court, and the officer call him three times. A witness is bound to attend in Court himself, pursuant to his subpœna; and it is no excuse for not attending that the person whom he employed as his agent, to watch the proceedings of the Court, neglected to give him notice in due time. (*Rex* v. *Fenn*, E. T. 1835, B. C., 3 D. P. C. 546).

ness for not obeying his subpœna; and an action lies against him for his non-attendance, if, in consequence thereof, the plaintiff is obliged to withdraw his record, although another witness might have proved the same fact.

BETTLY *v.* M'LEOD, H. T. 1837. C. P. 5 *D. P. C.* 481; S. C. 3 *Bing. N. S.* 405; S. C. 4 *Scott*, 131.

A witness who is subpœnaed and a guinea given on one side, and only a shilling on the other, is liable to the latter for non-attendance.

CASE against the defendants for not appearing to give evidence at Guildhall, in obedience to a writ of subpœna, in a trial in which Bettly was the plaintiff, and M'Leod, the father of the present defendant, was defendant; in consequence of which disobedience the plaintiff withdrew the record, and had to pay the defendant in the action 27*l.*, the costs of the day, and incurred other costs and expenses, &c. The declaration alleged that the party who served the subpœna paid the defendant a certain sum of money, viz. the sum of one shilling, being a reasonable sum of money for his costs and charges in and about his attendance as a witness according to the tenor of the subpœna. The defendant pleaded, first, not guilty; and secondly, denied the tender of a reasonable sum; and on these pleas issues were joined. The plaintiff's attorney stated that he served the defendant at Camberwell with a copy of the subpœna, and that the defendant then told him he was also subpœnaed on the other side, and had received a guinea for his expenses, &c.; and to questions from the witness, whether he required a guinea from the opposite party, he answered in the negative; and, consequently, witness on serving him with a copy of the writ, gave him a shilling, with which he was satisfied. The jury having found a verdict for the plaintiff, on motion to set aside the verdict—

Per Cur.—The counsel for the defendant object very speciously that a shilling is not a reasonable sum for the expenses of a witness coming from Camberwell. This, no doubt, is very true; but such is not the real question. The real question is, whether, under the present circumstances, rebus sic stantibus when the party had received a guinea from the one side, a shilling was not a reasonable sum from the other. The guinea was more than sufficient, and he ought not to have required another from the opposite party, unless, if we may so express ourselves, his object was to make himself perfectly impartial. The rule should be discharged.

2.—*Declaration.*

MULLETT *v.* HUNT, T. T. 1833. Ex. 1 *C. & M.* 752; S. C. 8 *Tyrw.* 875.

The declaration need not state that the original subpœna was shewn to the defendant.

IN case against a witness for not attending in pursuance of a subpœna—

The Court held, that, to sustain an action for not attending as a witness, pursuant to a subpœna, the original subpœna need not be shewn to the witness (unless where he demands to see it), and therefore, where a declaration alleged that the subpœna was made known and shewn to the defendant, and the evidence was that it was made known only, and conduct-money taken by the defendant, that part of the allegation, as to shewing the subpœna, may be rejected.

DAVIS *v.* LOVELL, H. T. 1839. Ex. 4 *M. & W.* 678; S. C. 7 *D. P. C.* 178.

It is sufficient if the declaration avers that the trial took place, "that the appearance of the defendant was material and necessary," and that the "defendant was solemnly called on to appear."

THE declaration stated that a certain issue came on to be tried before certain justices of assize at Taunton, on the 31st of March, 1838, and that, before the trial of the said issue, to wit, on the 21st of March, the plaintiffs sued out a subpœna duces tecum, directed to the defendant, commanding him to appear before the said justices at Taunton, on the 31st of March, and so from day to day, until that cause should be tried; which writ of subpœna the plaintiffs, before the trial, to wit, on the 2nd of April, caused to be shewn to the defendant; and that, although the appearance of the defendant was necessary and material at the said trial, and although the defendant could and might, in obedience to the subpœna, have appeared at the said trial of the said issue, and have shewn and produced the documents which were material evidence for the plaintiffs on the said trial, yet that the defendant did not appear, although he was solemnly called upon for those purposes, but wholly neglected to do so, whereby the plaintiff was nonsuited, &c. Plea, that the assizes commenced at Taunton on the 31st of March, and that the subpœna was first shewn to the defendant on the 2nd of April, and not before. Replication, that the subpœna was shewn to the defendant on the 2nd of April, but that the trial took place after the service of the subpœna, to wit, on the 6th of April; and that, at the time of the service, the defendant had notice that the trial had not taken place, and that a reasonable time elapsed after the service, and the defendant might have appeared in obedience to the writ. Upon general demurrer—

The Court held, first, that it sufficiently appeared that the trial referred to in the subpœna took place at the assizes mentioned in the declaration; secondly, that it was sufficient to aver that "the appearance of the defendant was material and necessary" at the trial, without stating that the plaintiff had a good cause of action; thirdly, that the defendant was liable to an action for disobedience of the subpœna, which required him to attend on the first day of the assizes, and so from day to day, till the cause should be tried, although the subpœna was not served till after the first day, as there was a reasonable time before trial for the party to reach the place of attendance; fourthly, that it was sufficient to aver that the defendant "was solemnly called upon" to appear; and, lastly, that an action will lie, though it do not appear that the absence of the defendant was the sole cause of the plaintiff's failing in his action.

MULLETT *v.* HUNT, T. T. 1833. Ex. 1 *C. & M.* 752; S. C. 8 *Tyrw.* 875.

And the omission of a distinct allegation of a good cause of action in the original suit is good after verdict.

CASE for not attending as a witness in pursuance of a subpœna. The declaration stated that the plaintiffs, before the committing of the grievance thereinafter mentioned, to wit, in Easter Term, in the second year of the reign, &c., in the Court of our lord the King, before the King himself, at Westminster, commenced and prosecuted a certain action against one John Hewitt, in a plea of trespass on the case upon promises, and such proceedings were thereupon had in the said court &c.; that a certain issue before then joined in the said action between the said parties was about to come on

for trial at the sittings of Nisi Prius, holden at Westminster Hall, in the county of Middlesex, on the 7th of November, A.D. 1832, before the Right Honourable Sir Thomas Denman, Knight, Chief Justice, and by a jury of the country, then and there chosen for that purpose, to wit, in the county of Middlesex; that, before the trial of the said issue, and also, before the committing of the grievances thereinafter mentioned, to wit, on the 13th of November, 1832, aforesaid, the plaintiff prosecuted out of the said Court &c. his Majesty's writ of subpœna, directed to Pierre Victor St. Marc, the said defendant, and John Mullett, by which said writ our lord the King commanded them, and every of them, that, all other things set aside, and ceasing every excuse, they and every of them should be and appear in their proper persons before his Majesty's right trusty and well-beloved the said Sir Thomas Denman, Knight, his Majesty's Chief Justice, &c., at Westminster Hall, in the county aforesaid, on Tuesday, the 27th of November then instant, by nine of the clock in the forenoon of the same day, and so from day to day until the said cause should be tried, to testify the truth, according to their knowledge, in a certain action then in the said Court of our said lord the King, before the King himself, pending between the said plaintiffs, and the said John Hewitt, on the part of the plaintiffs, &c.; which said writ the said plaintiffs afterwards, and before the committing of the grievance thereinafter mentioned, to wit, on the 14th of November, in the year aforesaid, caused to be made known to and shewn to the said defendant, and then and there caused a copy to be left with the said defendant, of so much of the said writ of subpœna as related to the said defendant, and then and there paid to the said defendant a certain sum of money, to wit, the sum of one guinea, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpœna; and that, although the said cause was, at the said sitting, afterwards, to wit, on the 8th day of December, A.D. 1832, aforesaid, called on to be tried before the said Chief Justice at Westminster Hall aforesaid, and although the said defendant was duly required to be and appear as a witness at Westminster Hall aforesaid, on the day and year last aforesaid, at the sitting of the Court, according to the tenor and effect of the said writ of subpœna and his duty in that behalf, and although the said defendant could have given material evidence for the said plaintiffs on the trial of the said issue, and without whose evidence the said plaintiffs could not safely proceed to the trial of the said cause, yet the said defendant, well knowing the premises, but not regarding &c., and contrary &c., did not nor would appear as a witness at Westminster Hall aforesaid, on the day and at the time he was so required to attend as aforesaid, according to the exigency of the said writ of subpœna, although he the said defendant was then and there solemnly called upon for that purpose, and had no lawful or reasonable excuse or impediment to the contrary, but then and there wholly refused, neglected, and declined so to do, to wit, at Westminster Hall aforesaid; and by reason thereof, and because the said plaintiffs could not safely proceed to the trial of the said cause without the testimony of the said defendant, they the said plaintiffs were afterwards, to wit, on the said 8th day of December, in the year aforesaid, forced and obliged to, and did withdraw the nisi prius record of the said issue, by means of which said several premises the said plaintiffs were forced and obliged

to pay &c., divers costs, charges, and expenses of their monies, amounting &c., and were also greatly hindered and delayed in trying the said cause, and in the recovery of their damages, in the plea aforesaid, &c. &c.

Per Cur.—The declaration states that the evidence which the witness could have given was material evidence in the cause, and that the plaintiff could not safely proceed to trial without it. Now, in our opinion, no evidence could be material in the cause unless the plaintiff had a good cause of action; and therefore, after verdict, we think that we must hold the declaration sufficient in that respect.

MASTERMAN *v.* JUDSON, H. T. 1832. C. P. 8 *Bing.* 224; S. C. 1 *M. & Scott*, 367.

Under 9 Geo. 4, an amendment allowed at the trial as to the statement of the subpœna*.

THIS was an action on the case against the defendant for not attending as a witness for the plaintiffs, pursuant to a subpœna. The declaration stated, that the plaintiffs, before the committing the grievances by the defendant thereinafter mentioned, to wit, in Hilary Term, 1831, &c., before *Tindal*, L. C. J., and his companions, Justices of the Bench at Westminster, impleaded one John Malin in a plea of trespass to the damage of the said plaintiffs of 100*l.*; and such proceedings were thereupon had, that afterwards, to wit, in the sittings at Nisi Prius, holden at Hertford, in the county of Hertford, on the 2nd of March, 1831, before *Bayley*, B., and *Garrow*, B., a certain issue before then joined in the said plea between the said plaintiffs and the said John Malin came on to be tried by a jury of the county; and also, that, on the 31st of January, in the year aforesaid, the said plaintiffs prosecuted out of the Court aforesaid his Majesty's writ of subpœna, directed to the said defendant and others, commanding them, and every of them, that, all other things set aside, &c., they should appear before the justices assigned to hold the assizes at the said town of Hertford, in the said county, on Wednesday, the 2nd of March then next, by nine of the clock in the forenoon, and so from day to day, until &c., to testify &c., in a certain action then in the Court before the said King's justices depending between the said plaintiffs and the said John Malin, of a plea of trespass, on the part of the said plaintiffs, and that they or any of them should in nowise omit, under the penalty of every of them of 100*l.*; which said writ the said plaintiffs, on the 19th of February, in the year aforesaid, caused to be made known to and shewn to the said defendant, and caused a copy to be left with the said defendant of *so much* of the said writ of subpœna *as related to the said defendant*, and paid to the said defendant the sum of 10*l.* for the costs of his attendance as a witness; and although the said defendant could have given material evidence for the said plaintiffs, on the said trial, against the said John Malin, yet the said defendant would not appear on the trial of the said issue, although he had no lawful cause or impediment to the contrary; and by reason thereof, and on no other account whatsoever, the said plaintiffs were nonsuited, and such proceedings were thereupon had, that afterwards, to wit, in Easter Term, in the year aforesaid, it was adjudged by the said Court, that the said John Malin should recover against the said plaintiffs 25*l.* 6*s.*, and charges by him laid out in and about his defence in that behalf; by means of

* See also ante, tit. *Amendment*.

which said several premises the said plaintiffs were not only forced to pay the said John Malin the said sum of 25*l.* 6*s.*, together with costs of levying the same, amounting to the sum of 10*l.*, but were also greatly hindered and delayed in the recovery of their damages in the plea aforesaid, and did necessarily incur a great expense, amounting to the sum of 100*l.*, in and about prosecuting the said suit, which the said plaintiffs are liable to pay, and are by means of the premises otherwise greatly injured, to the plaintiffs' damage of 200*l.* At the trial, it appeared that the original writ of subpœna was directed to the defendant, Judson, and two others therein named, and that the copy served on him was directed to him and John Doe, the name of John Doe not appearing in the original subpœna at all. Lord *Tenterden*, before whom the cause was tried, ordered the record to be amended by the insertion of the words printed in italics under the authority of the 9 Geo. 4, c. 15. A verdict was found for the plaintiffs—damages 50*l.*

Per Cur.—Upon the point reserved in this case for further consideration, namely, whether the amendment made upon the record of Nisi Prius, at the trial of this cause, was an amendment authorized by the statute 9 Geo. 4, c. 15, we think such amendment falls within the meaning and construction of the act, and is fully authorized by the same. The declaration, after stating that the writ of subpœna was issued in the cause, proceeded to aver, "that the plaintiff caused the said writ to be made known and shewn to the defendant, and caused a copy to be left with him." Upon the trial, it appeared that there was a variance between the copy or ticket, as it is usually termed, which had been left with the witness, and the original writ of subpœna, the former purporting to be addressed to the defendant and John Doe alone, whereas the original subpœna, when produced, appeared to be addressed, not only to the defendant, but to two other real persons. The plaintiffs, praying the Judge, who tried the cause at Nisi Prius, to order an amendment to be made, under the act above referred to, he directed an amendment to be made in these words: viz. "Caused a copy of so much of the said writ of subpœna as related to the defendant to be left with him." The trial then proceeded on the amended declaration, and a verdict was found for the plaintiffs. We cannot interfere.

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2. *By Attachment.*

DICAS *v.* LAWSON, H. T. 1835. Ex. 3 *D. P. C.* 427; S. C. 1 *C., M. & R.* 934; S. C. 5 *Tyrw.* 235.

An attachment does not lie if the testimony of the witness was not material*;

ON motion for an attachment against Lord Brougham and Vaux for a contempt of this Court, in not appearing at the trial of this cause, pursuant to his subpœna, an affidavit was produced, in which was stated the due service of the writ upon his lordship, and the tender of expenses, and in which the plaintiff swore that the evidence of Lord Brougham was material and necessary for him.

Parke, B., who had presided at the trial of the cause, stated,

* In order to subject a witness to an attachment for not obeying a subpœna, it must appear that he was called on it. (*Rex* v. *Stretch*, H. T. 1835, B. C., 3 D. P. C. 368). It is not competent for a person, served with a subpœna duces tecum, to shew that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment. (*Doe* d. *Butt* v. *Kelly*, M. T.

that the testimony of Lord Brougham was not material; this being an action of libel, and the only suggestion being, that his lordship was subpœnaed to prove its application to the plaintiff, which was not controverted by the defendant's counsel.

Lord *Abinger*, C. B.—The distinction between this and the ordinary applications of this nature is, that the Judge who tried the cause is now present in Court, and the counsel in the cause is also here. The purpose for which the noble lord was subpœnaed is stated to us; and the learned Judge reports, from his own recollection, that the testimony was not material. Under such circumstances, though the present affidavit might warrant the rule in ordinary cases, where the Court have no knowledge of the cause, we should not do right to grant this rule.—Rule refused.

FARRAH *v.* KEAT, E. T. 1838. B. C. 6 *D. P. C.* 470.

and a witness absent for a short time by leave is not liable to an attachment.

ON shewing cause against a rule for an attachment against a person named Farr, for an alleged contempt committed by him in not attending at the trial at the assizes, pursuant to his subpœna. In answer to the rule, an affidavit was sworn by Farr, in which he stated that he had attended the assize towns on the commission day, and seen the attorney for the plaintiff, on whose behalf the subpœna had been served. The attorney then told Farr that the cause would not come on before twelve o'clock on the following day, and therefore he need not be in Court until that time. In consequence of this suggestion he had not come into Court until half-past eleven on the following day. He then ascertained that the cause had been called on at ten o'clock, and disposed of before he came into Court.

Per Coleridge, J.—The act of the plaintiff's attorney in giving him leave to be absent at the time at which it appears the cause came on, I think, dispensed with the attendance of the witness so as to prevent his non-attendance from being a contempt.

REX *v.* ROOM, T. T. 1834. K. B. 3 *N. & M.* 725; S. C. 1 *Ad. & E.* 598.

So, no attachment lies for not attending at the quarter sessions;

A RULE had been obtained calling on the defendant to shew cause why an attachment should not issue against him for not attending to give evidence before the grand jury of the county of Warwick, at the quarter sessions for that county, on a bill of indictment against one Frederick Room; for certain misdemeanors, pursuant to a writ of subpœna served upon him. It appeared that a subpœna, under the seal of the Earl of Warwick, custos rotulorum of the county of Warwick, had been served upon the defendant, who resided in the same county, and in obedience thereto, he appeared in Court at the Michaelmas sessions for that county, and was sworn to give evidence before the grand jury, but afterwards refused, and left the town of Warwick; and in consequence of his absence the bill was thrown out. These facts were certified to this Court by the clerk of the

1835, B. C., 4 D. P. C. 273). But the Court will not grant an attachment against a witness for disobedience to a subpœna duces tecum, unless it appears clearly that the party absented himself or withheld the documents in defiance and contempt of the Court. (*Reg.* v. *Lord J. Russell*, T. T. 1839, B. C., 7 D. P. C. 693).

peace of the county of Warwick, by the order of the quarter sessions. The rule had been obtained on the stat. 4 Geo. 3, c. 92, s. 3, which enacts, "That the service of every writ of subpœna or other process upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person, to answer or give evidence in any criminal prosecution, in any other of the parts of the same, shall be as good and as effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the Court, out of which the same issued, upon proof made of the service thereof, to the satisfaction of the said Court, to transmit a certificate of such default under the seal of the same Court, or under the hand of one of the Judges or Justices of the same, to the Court of King's Bench in England, in case such service was had in England, or in case such service was had in Scotland, to the Court of Justiciary in Scotland, or, in case such service was had in Ireland, to the Court of King's Bench in Ireland. And the said last-mentioned Courts respectively shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process, issued out of such last-mentioned Courts respectively."

Per Cur.—It was even doubtful in the case of *Rex* v. *King*, (8 Term Repts. 585), whether the power of attachment existed on process out of the Crown-office. Now, this Court will not be disposed to extend the process of attachment, and that is the mode of vindicating its authority and punishing a contempt of it. There has been, however, no contempt of this Court. A mode does exist by which a subpœna may be obtained, a disobedience of which would be a contempt of this Court, but it has not been followed. As to the statute, that applies to a different case, and, though it is said that it must recognise this power as existing, we see nothing to warrant that inference.—Rule refused.

REX *v.* WOOD, M. T. 1832. B. C. 1 *D. P. C.* 509.

at all events, if it does, the original subpœna must be shewn.

ON motion for an attachment against the defendant, for not obeying a subpœna issued out of this Court, to appear at the quarter sessions, the affidavit on which the rule was obtained did not state that, at the time of serving the copy of the subpœna the original was shewn—

Littledale, J.—The original ought to be shewn at the time of serving the copy, in order to justify the issuing of an attachment.—Rule discharged.

JACOB *v.* HUNGATE, H. T. 1835. Ex. 3 *D. P. C.* 456.

If the original subpœna be not shewn, the rule will be discharged with costs.

ON motion for an attachment against A. B., for not attending at the trial of this cause, in pursuance of a subpœna served upon her, it was opposed upon an affidavit, which alleged that the original subpœna was not shewn to her at the time of service, and that no conduct-money was tendered. It was a town cause.

Lord *Abinger*, C. B.—In a town cause no conduct-money is required; but as the witness denies that the original was shewn, the rule must be discharged, with costs.

TAYLOR *v.* WILLIAMS, H. T. 1830. C. P. 4 *M. & P.* 59.

From a prior case it seems that the original subpœna need not be shewn.

UPON a motion for an attachment against a witness for not attending pursuant to a subpœna—

The Court held, it must be shewn that he was a material and necessary witness; but thought it is not necessary to produce the original writ of subpœna at the time of service on him.

THORP *v.* GISBORNE, E. T. 1826. C. P. 11 *Moore*, 55.

The copy must be served personally, and the application should be in the next term.

ON motion for an attachment of a witness for not obeying the subpœna—

The Court held, that it must be shewn that a copy was delivered to him personally, and in future such an application must be made in the term succeeding the service of the subpœna and trial.

TINLEY *v.* PORTER, T. T. 1837. Ex. 5 *D. P. C.* 744.

The affidavit must state the party to be a material witness.

ON motion for an attachment against one Askew, it was objected that the affidavit, on which the rule was obtained, did not state that Askew was a material witness.

The Court held, when the party has another remedy, he ought to shew in his affidavit that the person against whom he seeks to obtain an attachment was a material witness in the cause.

GARDEN *v.* CRESSWELL, H. T. 1837. Ex. 5 *D. P. C.* 461; S. C. 2 *M. & W.* 319.—S. P. TAYLOR *v.* WILLIAMS, H. T. 1830. C. P. 4 *M. & P.* 59.

But the affidavit need not state that the original subpœna was shewn to the witness.

A RULE nisi for an attachment had been obtained in this case against a witness for not obeying a subpœna, whereby the plaintiff did not recover the full extent of his demand. It was objected that it did not appear on the affidavits used for obtaining the rule, that the original subpœna had been shewn to the witness.

Lord *Abinger*, C. B.—That is not necessary; the party may shew cause on the affidavits used against him; and whoever seeks to bring a party into contempt must make out that he has been guilty.

PHILLIPS *v.* DRAKE, E. T. 1834. Ex. 2 *D. P. C.* 45.

The affidavit may be sworn before any judge.

ON motion for an attachment the affidavit was objected to. It was intitled in the Exchequer, but was not sworn before a Baron of the Exchequer; it appeared to be sworn before *Gaselee*, J., a Judge of the Common Pleas. It was contended that a Judge had no power under the 11 Geo. 4 & 1 Will. 4, c. 70, to take an affidavit in a matter which arose entirely in a Court of which he was not a Judge.

The Court, however, were of opinion that the affidavit was properly sworn, and that the "common jurisdiction" mentioned in the act was to be understood with reference to the subject-matter of the application, and not to the Court itself.

III. RELATIVE TO WHAT A WITNESS MAY DO WITHOUT BEING SWORN.

DAVIS *v.* DALE, 1830. N. P. 1 *M. & M.* 514; S. C. 4 *C. & P.* 335.

A witness producing papers need not be sworn.

IN this case it became necessary to give in evidence certain written agreements; and, for the purpose of producing them, a person who held them as an agent was called. He had been served with a subpœna duces tecum; but, on his appearing, the counsel for the plaintiff proposed to call on him to put in the papers without being sworn as a witness in the cause.

Tindal, C. J.—If the question were now submitted to me as a new question, I should know how to decide it; but I am told that there are cases on the subject; and though the report of those cases has not been quoted, yet I have no doubt that they have been correctly stated by the counsel; and, under these circumstances, I shall prefer following the practice to laying down any new rule of practice myself.—The papers were then allowed to be put in without the party who produced them being sworn.

PERRY *v.* GIBSON, E. T. 1834. K. B. 3 *N. & M.* 462; S. C. 1 *Ad. & E.* 48.—S. P. EVANS *v.* MOSELEY, H. T. 1834. Ex. 2 *D. P. C.* 361.

And that view has been taken in a subsequent case.

A WITNESS, called by the plaintiff, produced a book under a subpœna duces tecum, but was not sworn; and, upon its being objected, upon the part of the defendant, that the witness ought to be sworn, that an opportunity might be given for cross-examination, *Alderson*, B., overruled the objection, and a verdict was found for the plaintiff. On a rule to shew cause why that verdict should not be set aside, and a new trial had on that account, it was stated that it had been decided by the Court of Exchequer, in *Evans* v. *Moseley*, (2 D. P. C. 366), that it was not necessary that a witness, on producing a document under a subpœna duces tecum, should be sworn, and that, if the Court adhered to that decision, the motion could not be supported.

Lord *Denman*, C. J.—We had better not disturb a case which has been decided. The rest of the Court concurring—Rule refused.

IV. RELATIVE TO THE EXPENSES OF.

VICE *v.* LADY ANSON, T. T. 1827. N. P. 1 *M. & M.* 96.

A witness who returns from a journey earlier than he would is entitled to his expenses.

A WITNESS, being called in this cause, refused to be examined without first being paid her expenses. The witness resided in London, and had been subpœnaed there in August. Before that time she had intended making a journey to the Continent, and had gone there; but, to be in time for trial, she returned to London sooner than she would otherwise have done.

Lord *Tenterden*, C. J., held that she was entitled to receive the expenses of the journey, which were accordingly paid.

M'Alpine *v.* Poles, T. T. 1833. Ex. 1 *C. & M.* 795; S. C. 2 *D. P. C.* 299; S. C. 3 *Tyrw.* 871.

In general the allowance to witnesses is discretionary with the Master.

On a rule, calling on the defendant to shew cause why the Master's taxation should not be reviewed, and the expenses of two witness, who had come from Barbadoes, disallowed, the Master had thought that he was compelled to allow the expenses. The plaintiff had been induced to go to South America at the instance of the defendant, on the promise of certain accommodation, which was, in fact, not provided, and plaintiff and his family were obliged to return to England. An action was brought on this agreement, and his two sons, who were of the party, were brought over as witnesses. It was contended, in support of the rule, since 1 Will. 4, c. 22, the party should proceed by taking depositions, instead of bringing the witnesses over; for, where the act gives a specified mode, the parties should be compelled to adopt it, if there is no inconvenience shewn. It would have been no prejudice to the plaintiff to examine on interrogatories, as the defendant had to cross-examine, and he should have been the party, if either, to suffer.

Per Cur.—Formerly the party had no power to compel the attendance of a witness who was abroad. Then the act of Geo. 3 was passed, to prevent a failure of justice by the examination of a witness in India; the act of Will. 4 was to extend this power to the other British colonies. Its object is to make the production of evidence compulsory, for the benefit of either party who applies for a commission. A question now arises as to costs. We think that, in general, the Master should exercise his discretion after an inquiry into each case; and that, as here, he had allowed them, because he thought he was compelled.—The rule to review must be absolute.

Butler *v.* Hobson, M. T. 1838. C. P. 7 *D. P. C.* 157; S. C. 5 *Bing. N. S.* 128.

The partner of plaintiff's attorney attending as a witness is entitled to his expenses*.

In an action of trover by the plaintiff, as assignee of a bankrupt, the defendant, amongst other pleas, pleaded thirdly, that the plaintiff was not possessed as assignee; fifthly, that the plaintiff was assignee under a second commission of bankruptcy, under which the bankrupt obtained his certificate, and suffered the bankrupt to remain in possession and reputed ownership of the goods in question, to which goods the defendant, as assignee under a third fiat, was entitled. The verdict having been finally entered for the defendant on the third issue, and the jury having been discharged from the fifth, upon taxation of costs, the Master being of opinion that the defendant was bound to pay the expenses of a partner of the plaintiff's attorney, who took no part in the conduct of the cause, but was called as a witness, a rule was obtained to review his taxation.

Per Cur.—We do not see sufficient reason that the Master has exercised an unsound discretion, in allowing the costs of the attendance of the partner of the plaintiff's attorney as a witness; and are, therefore, of opinion, that the taxation in respect of that matter ought not to be disturbed.

* A foreign witness is entitled to his expenses. (*Lonergan* v. *Royal Exchange Assurance Company*, E. T. 1831, C. P., 7 Bing. 725).

BENTALL *v.* SYDNEY, H. T. 1839. Q. B. 10 *Ad. & E.* 162; S. C. 2 *P. & D.* 416.

The clerk to the Petty Bag Office is entitled to a reasonable fee, and to his expenses in conveying the rolls, &c., which he is called on to produce.

DEBT for money owing to the plaintiff, as senior clerk of the Petty Bag of the Court of Chancery, for his attendance with the books containing the enrolments of the admission of solicitors of that Court, as a witness in the Court of Queen's Bench. It was proved that the defendant was desirous of having the rolls of the Court of Chancery, to give evidence in a cause of *Hill* v. *Sydney*, and he applied to the plaintiff, who was the senior clerk in the Petty Bag Office, to get an order from the Master of the Rolls for their production, which order the plaintiff procured. The plaintiff was served with a subpœna duces tecum, to produce these rolls on the trial of the cause, which was set down for the 14th of June, on which, and the three following days, one of the clerks in the Petty Bag Office attended the Court of Queen's Bench. On the last of those days the cause was tried, and the rolls were produced by the clerk, and put in evidence. The rolls were contained in three folio volumes, more than he could well carry from Chancery Lane to Westminster, and he carried them backwards and forwards in a hack cabriolet. In the office of the Petty Bag, the ordinary common-law business of the Court of Chancery is transacted. There are three principal clerks in the Petty Bag Office, and they have no salaries, but are paid by fees; they jointly appoint a deputy clerk, who has a fixed salary, and he appoints clerks, who are paid by him. The plaintiff is the senior of the three principal clerks, and as such he is entitled to the custody of the rolls in the Court of Chancery, It is the official business of the plaintiff to produce the rolls by himself or his clerk, generally by his clerk; and that business belongs exclusively to him, and he alone receives the emoluments which arise in respect of it; but some branches of the business of the Petty Bag Office are paid by fees, which are divided amongst the three principal clerks. When the subpœna was served and order obtained, one guinea was paid for attendance, and 12*s.* for the order; and the sum the plaintiff sought to recover in this action was three guineas, for three days' further attendance after the first day, and 8*s.*, being 2*s.* a day, for coach-hire. The clerk saw the defendant at his office the first day, and asked him if he was to attend on the following day. The defendant said, "Certainly." The clerk asked the defendant for the fees of the next day's attendance; the defendant said there was a great probability that it would be the following day, and that the fees would then be paid together. The clerk, at a subsequent time, told the defendant, that the plaintiff had desired him to say, that if he would pay the plaintiff the fees claimed, the plaintiff would forego any costs. The defendant said, if the plaintiff had chosen to have waited till the cause of *Hill* v. *Sydney* was settled, the fees would have been paid; but it was only on that principle he resisted. It appeared that, in the year 1743, Lord *Hardwicke* made orders as to fees in the offices in the Court of Chancery, and amongst those, in the Petty Bag Office, there was a direction, "For attending with any record out of the office, the clerk attending is to be paid a reasonable fee, according to the time of such attendance." Evidence was given, that, for between forty and fifty years, a guinea a day had been regularly paid for attending a Court

with the rolls, and it had occurred hundreds of times, and never had been known to be resisted but once. *Littledale*, J., directed a verdict for the plaintiff, and gave the defendant leave to move to enter a nonsuit.

Per Cur.—The obligation to attend the Court arises, no doubt, from the subpœna; but that subpœna is served upon a person who, in the ordinary course of things, is not primarily bound to attend to it. It originates with the Master of the Rolls, and he, or the Chancellor, may very reasonably say, that he will not grant an order for the carrying of the rolls to and fro, unless the officers are paid for their trouble; and we think we are not to confine the necessity of obeying the subpœna to the service, as in *Collins* v. *Godefroy*, (1 B. & Ad. 950), but we must also look to the order of the Master of the Rolls. We think it not necessary that the defendant should have had notice of any order of the Chancellor as to a remuneration to the officer of the Petty Bag. If a defendant, instead of applying for an examined copy of such part of the rolls as he wants, chooses to get an order for their production, he must be cognizant of the rules of the office in that respect, and which, independent of Lord *Hardwicke's* order, have prevailed between forty and fifty years; and there was no necessity for the plaintiff to tell him that he relied upon the order of the Master of the Rolls, and did not consider himself bound by the obligation of the subpœna as in ordinary cases; and the statements of the defendant, on two occasions, are quite sufficient to shew that he was acquainted with the custom of the office. We think it no objection to the plaintiff to recover, that he did not attend personally. According to the custom of the office, the duty of producing the records was cast upon him, but there was nothing about his attendance personally. It was the same thing, whether one of the clerks or another had the custody of the rolls to produce, as long as they were in the keeping of the officers of the Court of Chancery. In fact, the plaintiff scarcely ever personally attended. Indeed, it is singular enough, that, if issue be joined, the Chancellor delivers the record with his own hands to the King's Bench, to be there tried. (4 Inst. 80; 1 Eq. Cas. Abr. 128). But if the record be delivered by the clerk of the Petty Bag, it will be well removed, for that may be said to be propriâ manu of the Chancellor which is done by his officer. (1 Eq. Cas. Abr. 128, 129). We think, therefore, this case does not fall within *Collins* v. *Godefroy*, for the plaintiff does not attend merely in consequence of the subpœna, for that alone would not have been sufficient to compel him to produce the rolls; but he attends in consequence of the order of the Master of the Rolls and the subpœna together; and we think that the plaintiff is entitled to recover a reasonable compensation for his attendance on the production of the rolls.—The rule, therefore, must be discharged.

WHITE *v.* BRAZIER, II. T. 1835. Ex. 3 *D. P. C.* 499.

A witness is not entitled to claim wages as expenses.

A MASTER of a vessel, detained here as a necessary witness, was allowed, in the taxation of costs, the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month for wages, which, if he had sailed, he would have been entitled to.

The Court held, that the Master was right in not allowing the claim for wages.

BASTARD *v.* SMITH, T. T. 1839. Q. B. 2 *P. & D.* 453.

A witness called to translate and explain ancient documents is not within Rules H. T. 2 Will. 4 and H. T. 4 Will. 4.

A RULE had been obtained, calling on the Master to shew cause why he should not review his taxation of costs. An objection to the taxation was (amongst others), that the costs of a witness who had been called, on the part of the plaintiff, to produce certain ancient documents of a public official nature, and to attend with a translation of them, had been allowed to the plaintiff on taxation. The objection to this taxation proceeded on the Rule of Hil. T., 2 Will. 4, r. vi, that the expenses of a witness called only to prove the copy of any judgment writ, or other *public* document, will not be allowed in costs, unless the party calling within a reasonable time before the trial have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party has refused or neglected to make such admission. This was extended by Rule 20, Hil. T. 4 Will 4, which directs "that no costs of proving any written or printed document shall be allowed to any party, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it." But the witness in this case is not called to prove a document only; he is called to give a translation, which is neither within the words nor spirit of the rule; and also as a person of skill, to give an explanation of the documents which he produces.

Per Cur.—This witness is not within Rules H. T. 2 Will. 4, or H. T. 4 Will. 4; he is called as a skilful person, to give information on oath to the Court of the purport of ancient documents.—Rule discharged.

NEWTON *v.* HARLAND, M. T. 1840. C. P. 9 *D. P. C.* 16; S. C. 1 *Scott, N. S.* 502.

Although a witness takes the shilling, he is still entitled to a reasonable amount to pay his expenses back.

ON an attachment against a witness for not attending the trial of this cause, pursuant to a subpœna which had been served upon him. The affidavit, on which the motion was founded, stated the service of the subpœna upon the witness, and the payment to her of 1*s.* at the time, but did not allege that any further conduct-money had been given to her. It proceeded to state, however, that the witness had gone to York, where the trial was had, to lodgings, which had been provided for her by the plaintiffs, where she partook of the board which had been prepared for her; but that, on the morning of the trial, although a close carriage was brought to the door of the house to convey her to the Court-house, distant only half a mile, she refused to go to the Court-house, unless a sum of 9*l.* was paid to her to enable her to return.

Per Cur.—It appears to us that the general right of a witness is, that he shall have paid or tendered to him a reasonable sum for going to and returning from the place of trial, and for his attendance there. The party may, if he thinks proper, waive that right, and in this case it appears that the witness did waive all tender or payment, so far as her going to York went; but then comes the point, "how is she to go back?" And all that is stated is, that she demanded a sum of 9*l.* That may have been unreasonable; but we think that the demand having been made, it was incumbent on the plaintiff, who could only avail himself of her waiver up to that time, to make her a tender of a reasonable sum at all events.

MOUNT *v.* LARKINS, E. T. 1832. C. P. 8 *Bing.* 195; S. C. 1 *M. & Scott*, 357.

On a new trial, if intimated a witness will not be required, his expenses will not be allowed.

IN a policy cause, the prothonotary on taxation allowed subsistence to the master of the ship insured, a material witness, from the time of subpœna to the time of trial; but refused to allow for his subsequent detention, pending a rule for a new trial, in which the Court at an early stage intimated, that the only point would be one to which his evidence would not apply; the witness resided in England, and was not examined; he was a master in the royal navy, and did not shew the permission of the Admiralty for his engaging in the merchant service. On motion to review the taxation—

Per Cur.—It seems to us no sufficient grounds have been shewn for reviewing the prothonotary's taxation on the one side or the other. As to the motion to reduce the sum allowed, there is no doubt that he was a material witness; and, indeed, we ought not to speculate too nicely upon that point when there is a fair and reasonable ground for requiring the attendance of a witness; and that being so, the prothonotary is the proper officer to determine the quantum of allowance. In the case of *Berry* v. *Pratt*, (1 B. & C. 276), the Court of King's Bench confirmed an allowance for the subsistence of a common mariner; and the witness here being a master in the royal navy, and in the habit of obtaining employment in the merchant service, his case cannot be distinguished from that of a mariner. On the other hand, we see no reason for increasing the sum which has been allowed. It has been contended that it was necessary to detain him till the result of a motion for a new trial should be known; but at a very early stage in that proceeding, the Court intimated that a new trial should be confined to seaworthiness, a point to which the defendant did not propose to examine the witness. It appears to us, therefore, that there is no ground for sending the case back to the prothonotary.

EVANS *v.* PHILPOTTS, 1840. N. P. 9 *C. & P.* 270.

An I. O. U. for the amount of a witness's expenses may be enforced under counts for money had &c., and an account stated *.

A., AN attorney, caused B. to be subpœnaed as a witness in a cause in which A. was attorney, and B., before he went to the assizes, asked A. who was to pay him? and A. said he would do so. After the assizes, at which B. attended, and was examined, A.'s clerk, by the direction of A., gave B. an I. O. U. for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party after the costs in the cause had been taxed.

Gurney, B., held, that B. might recover the amount from A. on a declaration containing counts for money had and received, and on an account stated.

V. RELATIVE TO THE EXAMINATION OF.

(*a*) IN CHIEF.

HOMAN *v.* THOMPSON, M. T. 1834. N. P. 6 *C. & P.* 717.

If a witness states on the

A WITNESS was examined on the voir dire, and he stated that he was not liable to pay the costs of the defence in this action. It was

* A witness cannot sue for loss of time. (*Collins* v. *Godefroy*, T. T. 1831, K. B., 1 B. & Ad. 950).

proposed, for the plaintiff, to put a letter into the hand of the witness, which he had written to the defendant's wife. On the other side, it was contended that this was going beyond an examination on the voir dire.

voir dire he is not liable, a letter may be put into his hand and the question repeated*.

Parke, B.—You may shew the letter to the witness, and then ask him if he is liable to the attorney.

ROSE *v.* BLAKEMORE, E. T. 1826. N. P. 1 *Ry & M.* 382.

A witness may decline to answer a question, and no inference can be drawn.

IN the course of the cause a witness refused to answer a question, whether he had published a particular hand-bill, on the ground that he had been threatened with a prosecution for the publication. *Abbott*, C. J., held the excuse sufficient. Counsel, in addressing the jury for the defendant, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him. On which—

Abbott, L. C. J., interposed, and said that no such inference ought to be drawn; and that there was an end of the protection of a witness if a demurrer to the question were to be taken as an admission of the fact inquired into.

HAIGH *v.* BELCHER, T. T. 1836. N. P. 7 *C. & P.* 389.

Irrelevant questions may be put if to tend to facts relevant to the issue.

ON an objection to the cross-examination of a witness, the Judge will allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, as relating to a third person, if the defendant's counsel undertake that it shall be shewn by other evidence that those facts are relevant to the issue.

JAMESON *v.* DUNKALD, E. T. 1827. C. P. 12 *Moore*, 148.

Scientific witnesses ought only to be examined as to facts proved.

In this case—

The Court held, that scientific men ought only to be examined as to their opinions upon the facts proved in evidence at the trial, and not as to the merits of the case.

COLLIER *v.* SIMPSON, T. T. 1831. N. P. 5 *C. & P.* 73.

But medical witnesses may be asked their judgment on medical works.

CASE for slander.—The words imputed the prescribing of medicines in improper doses, and the defendant justified.

Tindal, C. J., held, that medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in to shew that such doses were sanctioned, but that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books, as a part of their general knowledge.

* Where a witness is asked whether a party said anything about an order in any conversation, the opposite party may inquire as to the whole conversation; but if the witness deny that he had such conversation with the plaintiff, he cannot be asked if he heard the plaintiff say anything about an order. (*Dicas* v. *Lord Brougham*, M. T. 1833, N. P., 6 C. & P. 249). Where the question put to an interested witness (a creditor in a suit to try the validity of a commission) merely informed the plaintiff of a fact, viz. the existence and custody of an instrument, which must be produced and speak for itself:—Held, that it was not open to the objection that such communication was biassed by interest, and might therefore be asked. (*Binfield* v. *Turner*, 1819, N. P., 1 Gow, 202).

COOK *v.* HEARN, 1832, N. P. 1 *M. & Rob.* 201.

A witness cannot be examined as to documents without notice to produce.

To establish an admission, the plaintiff attempted to shew that the defendant had paid money into Court. For this purpose he called the defendant's attorney, and asked him if he had not in Court the rule for payment of money into Court. This was objected to, on the ground that no notice to produce had been given, or subpœna duces tecum served on the attorney.

Patteson, J., refused to allow the question to be put.

(*b*) CROSS-EXAMINATION.

CREEVY *v.* CARR, T. T. 1835. N. P. 7 *C. & P.* 64.

If a witness is only asked an immaterial question, and the examination stopped by the Judge, he cannot be cross-examined*.

IN an action for a libel, it was proposed, on the part of the defendant, in mitigation of damages, to give evidence to shew that the alleged libel was copied in substance from the Weekly Dispatch newspaper, with an omission of certain passages which reflected on the plaintiff.

Gurney, B.—I think that may be done. The evidence was received. Counsel for the defendant called another witness, and asked him, "Are you the landlord of the house at which the fire occurred?" The witness, "I am, Sir." *Gurney*, B.—What, do you propose to prove more? that closes the plaintiff's case. But counsel for the defendant contended he was entitled to cross-examine the landlord. *Gurney*, B.—Oh, no; I stopped his evidence. You have not, where the witness has been only asked an immaterial question, and his evidence is stopped by the Judge.

* A witness may be asked, on cross-examination, if he has not used particular expressions, in order to lay a foundation for contradicting; and upon his denial, the witness called to prove that he had may be asked as to the particular words read from the brief. (*Edmonds* v. *Walter*, 1819, N. P., 3 Stark. 8). A witness, on cross-examination, may admit not having mentioned a fact on a former examination, though that examination is in writing, and not produced. (*Ridley* v. *Gyde*, 1832, N. P., 1 M. & Rob. 197). If a witness called for the plaintiff be asked, on the part of the defendant, whether the plaintiff had any conversation with him on a particular subject, and the witness state any thing that the plaintiff said on that subject, the plaintiff's counsel may examine as to every part of the same conversation; but if the witness state that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to any thing else that the plaintiff said. (*Dicas* v. *Lord Brougham*, M. T. 1833, N. P., 6 C. & P. 249).

Where a letter is put into a witness's hand, on cross-examination, to read, and questions founded on it:—Held, that counsel is not bound to have the letter read until after he has addressed the jury. (*Holland* v. *Reeves*, H. T. 1835, N. P., 7 C. & P. 36). And where the counsel for the defendant, in his cross-examination, puts a paper in the witness's hand to prove the plaintiff's signature:—Held, that the opposite counsel could not demand to look at the paper. (*Russell* v. *Rider*, E. T. 1834, N. P., 6 C. & P. 416). If the witness has made a previous contradictory statement, in writing, on a matter relevant to the issue, he may be asked, on cross-examination, whether the paper containing it is of his handwriting; and if he admit it, that will entitle the other side to read it; and if it contradicts the evidence of the witness, he may be called back to explain it. (*Crowley* v. *Page*, 1837, N. P., 7 C. & P. 789).

RUSH *v.* SMITH, T. T. 1834. Ex. 1 *C., M. & R.*, 94; S. C. 4 *Tyrw.* 675.

A witness who merely produces documents is not to be cross-examined.

AN officer, who had been subpœnaed to produce the warrant of distress in respect of which the action was brought, was called, and was, by mistake, sworn as a witness. The plaintiff's counsel having put the question to him, whether he was employed as bailiff, and had any warrant, to which, however, no answer was given, the defendant's counsel insisted that he had a right to cross-examine. *Vaughan*, J., held otherwise, and the same officer was afterwards called as a witness for the defendant, and the plaintiff obtained a verdict.

Per Cur.—The whole of the evidence has been fairly laid before the jury, though not in the order contended for by the defendant; and that being the case, there is no ground for disturbing the verdict. The practice is now well settled, that, where you call a witness under a subpœna duces tecum, and he produces the required documents, which he is bound to do at his peril, and you do not examine him, but identify the documents by other witnesses, the person producing the documents is not subject to cross-examination.

(*c*) RE-EXAMINATION.

ADAMS *v.* BANKART, H. T. 1835. Ex. 1 *C., M. & R.* 681.

After the plaintiff's case is closed, he cannot re-call a witness without the defendant's consent*.

IN assumpsit for goods sold and delivered, it appeared that the plaintiff was the surviving partner of a firm carrying on business at Leicester; Paris and Heygate, the other two partners, having died in 1833. Certain accounts existing between that firm and the defendants, a Mr. Miles had been engaged as arbitrator between them, and it was proved that Paris and the plaintiff had attended the arbitrator, and recognised his authority; but it was not shewn that H. had done so. The submission was not by deed. The arbitrator had made his award in favour of the partners, and directed that the defendants should pay a certain sum to them. When the plaintiff's case was closed, the counsel for the defendants said he must be nonsuited, because there was no evidence of H.'s assent, and one partner cannot bind the other partners by his submission of partnership matters to arbitration. Upon this objection being made, it was proposed to re-call the arbitrator, who had been already examined, to ascertain whether or not H. had assented to the reference; but *Taunton*, J., refused to allow it to be done without the consent of the defendants' counsel, which was not given. It was stated, on the motion afterwards made in Court, that he declared he had no power to do so; but, upon his report of the trial, it appeared that he had acted upon his own discretion. The objection not being removed, he held it to be fatal, and nonsuited the plaintiff.

And the Court held it was in the discretion of the Judge, whether he would allow him to be re-called.

* But the Judge will, in general, allow the plaintiff to adduce fresh evidence to obviate objections which are beside the justice of the case, but not to get rid of any difficulty on the merits. (*Giles* v. *Powell*, H. T. 1826, N. P., 2 C. & P. 259; S. P. *Walls* v. *Acheson*, Id. 268).

(*d*) Witness not bound to criminate himself.

Maccallum *v.* Turton, H. T. 1828. Ex. 2 *Y. & J.* 183.

A witness is not bound to answer a question *directly* criminating himself;

In this case—

The Court said, they will not compel a defendant to answer allegations which may subject him to penalties. This protection extends, not only to the question which directly may tend to criminate him, but to every link in the chain of proof.

Roberts *v.* Allatt, T. T. 1828. N. P. 1 *M. & M.* 192.

and that which would subject the witness to a penalty is within the rule.

The defence was, that the bill was drawn and accepted for the balance of an account of stock-jobbing transactions. To prove this, one of the parties to the transaction was called as a witness. He objected to answer the question, on the ground that his answer might subject him to penalties under the Stock-jobbing Acts. It, however, appearing that it was too late now to commence proceedings for them—

Lord *Tenterden*, C. J., held the witness bound to answer the questions put to him.

East *v.* Chapman, H. T. 1827. N. P. 2 *C. & P.* 570.

But a witness may be asked whether the libel was not written by him.

In an action for a libel, a witness was asked on his cross-examination whether the MS. of the libel was not in his handwriting. He appealed to the Court to say whether he was bound to answer.

Abbott, C. J.—I think, having given evidence, you must answer the question. You might have objected to give evidence at first; but, having gone through a long history of what passed, and was not taken down, you must still go on, otherwise the jury will only know half of the matter.

Comdell *v.* Pratt, 1827. N. P. 1 *M. & M.* 108.

And a witness is bound to answer a question though degrading.

A witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; and on her refusing to answer—

Best, C. J., interposed.—The rule I shall always act on is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions which tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment, and I therefore think it ought not to be put.

(*e*) Impeaching the testimony of.

Bradley *v.* Ricardo, M. T. 1831. C. P. 8 *Bing.* 57; S. C. 6 *M. & P.* 133; *semble overruling* Alexander *v.* Gibson, 2 *Campb.* 556.

A party may call witnesses to disprove statements

Case for a false return of nulla bona to a writ of fieri facias issued at the suit of the plaintiff. The plaintiff put in the box the sheriff's officer, to produce the warrant, who, upon his cross-

examination, stated, that the party against whom the fieri facias was issued had no goods in the county, either at or since the delivery of the writ. The plaintiff then called another witness to prove that the party had goods in the county; but it was objected that he could not discredit his own witness without striking out his evidence altogether, and the Judge so thinking, the plaintiff was nonsuited. made by his witnesses*.

Per Cur.—A party ought not to be concluded by any statement of his own witness. Suppose a material fact rests within the knowledge of the attorney of the opposite party, and the plaintiff is obliged to call him to prove that fact, and the witness makes other statements adverse to the plaintiff, it would be unjust to preclude the plaintiff from calling other witnesses to disprove such adverse statement, or to compel the plaintiff to give up the proof of the material fact. Cases of this kind, like all other cases of conflicting testimony, are peculiarly for the consideration of the jury. The rule is, that a party may not throw general discredit upon his own witness, by bringing evidence of his general bad character; but he is not precluded from disproving any particular fact stated by his own witness. It is not uncommon for witnesses to refuse stating what they know until put into the box, and it would be hard and unjust that parties should be concluded by statements made by such witnesses.

ANGUS *v.* SMITH, M. T. 1829. N. P. 1 *M. & M.* 473.

THE plaintiff's case was proved by one witness, his son, who, on cross-examination, denied that he had ever said he was in partnership with the defendant. The case for the defendant was, that he was accountable to the witness only as a partner, and not to the plaintiff. It was for the defendant proposed to ask a witness whether, on a particular occasion, the plaintiff's witness had told him that he was in partnership with the defendant. This was objected to, on the part of the plaintiff, on the ground that his witness had not been questioned as to the particular person or conversation with respect to which it was proposed to contradict him. But the particulars must be disclosed as to the proposed contradiction.

Tindal, C. J.—As far as the contradiction of the witness of the plaintiff is concerned, I am clearly of opinion that the conversation proposed is not admissible in evidence. I understand the rule to

* Where, after the plaintiff had established his case by four witnesses, he called another, who deposed in direct opposition to the statement given shortly before to the attorney who had examined him:—Held, (per *Denman*, C. J., contrà, *Bulland*, B.), that the attorney might be called and might read such written statement, in order to neutralize the unexpected evidence of such a witness. (*Wright* v. *Beckett*, 1838, N. P., 2 M. & Rob. 414; and see *Ewer* v. *Ambrose*, 3 B. & Cr. 746; *Friedlander* v. *London Assurance Company*, 4 B. & Ad. 193; Buller, Ni. Pri., 297; *Rex* v. *Oldroyd*, Russ. & Ry. C. C. 88). But a witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it of his having done so. (*Long* v. *Hitchcock*, T. T. 1840, N. P., 9 C. & P. 619). And where a witness, on cross-examination, had said that he had no recollection of having made particular declarations, not expressly denying them:—Held, that it was not competent to the opposite party to call witnesses to prove that the witness had made such declarations. (*Pain* v. *Beeston*, 1830, N. P., 2 M. & M. 20). Where a witness, on cross-examination, denies having made particular statements, and a witness is called to prove he did, the particular words cannot be put, but he must be asked what passed. (*Hallett* v. *Cousins*, 1837, N. P., 2 M. & Rob. 238).

be, that, before you can contradict a witness, by shewing he has, at some time or other, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the proposed contradiction.

HIGHFIELD *v.* PEAKE, 1827. N. P. 1 *M. & M.* 109.

To contradict a witness, an examined copy of a deposition in Chancery is admissible.

ON an issue out of Chancery, in order to contradict the witness, it was proposed to read an office copy of the depositions, which had also been examined with the original depositions. The depositions had been read before the Master of the Rolls from another office copy.

Littledale, J., said—I am of opinion that the evidence is sufficient. I think that it would be so in any case, and it is more decidedly so here; for there is a case in Burrow, (*Denn* d. *Lucas* v. *Fulford*, 2 Burr. 1179), where it was held, that, in the same Court and same cause, an office copy is sufficient; and this, being an issue out of the Court of Chancery, may be considered as a proceeding in that Court, and therefore the office copy would probably be evidence enough. In this case, however, it is an examined copy also.

(*f*) OF THE SOURCE FROM WHICH A WITNESS MAY DERIVE INFORMATION OR REFER TO.

STEINKELLER *v.* NEWTON, M. T. 1838. N. P. 9 *C. & P.* 313.

The memorandum must be contemporaneous with the transaction*,

IN this case *Tindal*, C. J., said,—To enable a witness to use a paper written by himself, for the purpose of refreshing his memory, it must be shewn that the paper was written contemporaneously with the transaction it refers to.

HOWARD *v.* CANFIELD, H. T. 1836. B. C. 5 *D. P. C.* 417.

and must be produced;

A WITNESS had been called on the part of the plaintiff to prove a portion of his demand, but it appeared, on inquiry, that he had no recollection of what he was called upon to prove, except by reference to his book. The book, however, was not produced.

Coleridge, J.—I am of opinion, that, as the witness spoke to the memorandum, it ought to have been produced.

JONES *v.* STROUD, M. T. 1825. N. P. 2 *C. & P.* 196.

not a copy;

IN an action for slander, the witness who proved the words read them from a paper, which he acknowledged was a copy of an original memorandum; he said, that he made the memorandum very near the time when the words were spoken, and the copy about

* A witness allowed to refer to his deposition taken before commissioners, to refresh his memory as to a date, but not to go through the whole. (*Smith* v. *Morgan*, 1837, N. P., 2 M. & Rob. 259).

Where a party, who has given a memorandum which he might himself have looked at to refresh his memory, had since become blind:—Held, that it might be read over to him for that purpose. (*Catt* v. *Howard*, 1819, N. P., 3 Stark. 4).

six months after. The original paper could not be found. It was contended that the witness had a right to refresh his memory with the copy, as it appeared in evidence that the original paper was mutilated.

Best, C. J.—I am quite clear that he has no such right. He can only look at the original memorandum made nearest the time.

BURTON *v.* PLUMMER, M. T. 1834. K. B. 4 *N. & M.* 315.

unless a duplicate original.

THIS was an action for goods sold and delivered, tried before the Secondary of the Sheriff of London; by whose notes, it appeared, that the witness called to prove the cause of action at the time the goods were delivered out entered them by weight in a ticket or waste-book, and that, on the same day, the entries were copied out of the ticket or waste-book into a ledger by the plaintiff, in the presence of the witness, and the value put, and these entries were checked by him, the witness having at the time a distinct recollection of the entries in the ledger as to the weight and the day on which the goods were delivered. The ticket or waste-book was not produced, and the Secondary refused to allow the witness to refresh his memory by reference to the ledger; and it appeared, by affidavit, that, the Secondary having stated, that, unless the plaintiff consented to a nonsuit, he must direct the jury to find a verdict for the defendant, for want of evidence, the plaintiff's attorney consented to be nonsuited. A rule having been granted, calling on the defendant to shew cause why that nonsuit should not be set aside, and a new trial had—

Per Cur.—It is quite clear that the Secondary has been mistaken in refusing to allow the witness to refer to the ledger to refresh his memory: though, in fact, it was a copy of an entry, it cannot be considered as a copy, but a duplicate original made under the witness's own eyes, and checked by him, whilst the circumstances were fresh in his memory; and he might well look to that entry to refresh his memory at the trial.

SINCLAIR *v.* STEVENSON, M. T. 1824. N. P. 1 *C. & P.* 582.

The opposite counsel is entitled to see the memorandum,

A PAPER was about to be put into the hands of another witness, to enable him to explain some part of his evidence, when—

Best, C. J., said,—If you put a paper into the hands of a witness, in order to refresh his memory, the other side have a right to see it; if you merely give it him to prove a handwriting, they have not such right.

LLOYD *v.* FRESHFIELD, T. T. 1826. N. P. 2 *C. & P.* 325.

and the witness may be cross-examined as to the memorandum*.

A WITNESS who was called refreshed his memory as to the numbers of bank-notes by an entry in a book.

Abbott, C. J., held, that the counsel of the opposite party might cross-examine as to the other parts of the entry.

* If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries without making them his evidence, and the jury may see the entries, if they wish to do so; but if the opposite counsel cross-examine as to the other entries in the same book, he makes them his evidence. (*Gregory* v. *Tavernor*, M. T. 1833, N. P., 6 C. & P. 280).

(*g*) Ordering witnesses out of court.

Southey *v.* Nash, H. T. 1837. N. P. 7 *C. & P.* 632.

Either party may require unexamined witnesses to be ordered out of Court at any time,

After the plaintiff's case had closed, he applied that the defendant's witnesses might be ordered out of Court. It was contended to be too late.

Alderson, B.—Either party has a right, at any moment, to require that the unexamined witnesses shall leave the Court.

Taylor *v.* Lawson, M. T. 1828. N. P. 3 *C. & P.* 543.

as a matter of course.

On an application that all witnesses leave the Court—

Best, J., said,—I confess, that, for one, I wish the same rule prevailed here as prevails in the House of Lords and Commons, where no witnesses are allowed to be present, except the person who is under examination. I will grant the application.

Everett *v.* Lowdham, T. T. 1831. N. P. 5 *C. & P.* 91.

Ordering witnesses out of Court does not apply to the attorney in the cause,

Application was made on behalf of the defendants to have the witnesses ordered out of Court, with the exception of the attorney who had been subpœnaed on the part of the plaintiffs. The case of *Pomeroy* v. *Baddeley*, reported in 1 R. & M. 430, infra, was referred to, in which Mr. Justice *Littledale* excepted the attorney in the cause from a general order for the witnesses to withdraw, on a statement by counsel that he could not conduct the case without his assistance.

Bosanquet, J., under the circumstances, allowed the attorney to remain in Court.

Pomeroy *v.* Baddeley, 1826. N. P. 1 *Ry. & M.* 430.

his assistance being necessary in Court.

All witnesses were ordered out of Court. It was contended that the attorney for the defendant, whom it was intended to call for the defendant, should leave the Court.

Littledale, J., said that an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being, in most cases, absolutely necessary to the proper conduct of a cause.

Parker *v.* M'Williams, T. T. 1830. C. P. 6 *Bing.* 683.

The admission or rejection of the witness is discretionary with the Judge, with respect to the witness remaining,

This was an action against the defendants, the wife being administratrix of one Miss Horsefall, who died intestate, to recover a sum of 200*l.*, alleged to have been deposited by the plaintiff in the hands of the deceased. At the trial of the cause, before Lord Chief Justice *Tindal*, in pursuance of an arrangement to that effect, an order was made requiring all the witnesses to withdraw. The first and principal witness, when called, stepped into the box from a part of the Court near the plaintiff's counsel, where he had remained during the opening, not having obeyed the order for retiring. It was thereupon objected, on the part of the defendant, that the witness ought not to be permitted to give evidence, (particularly as he was called for the purpose of proving the most material fact in the case), he having been present and heard the whole opening speech

of the plaintiff's counsel, wherein the facts upon which he relied were detailed most minutely. His Lordship (speaking in a low tone of voice) asked the witness whether he had heard the opening speech? He replied, without hesitation, that he had not, for that he was very deaf. His testimony was received. He spoke to the fact of the deposit having been made by the plaintiff; and three other witnesses proving conversations with the deceased, wherein she had admitted that she had made the plaintiff a present of 200*l.*, which she (the plaintiff) had returned her to keep, the jury returned a verdict for the plaintiff. On motion to set aside the verdict—

Per Cur.—We will not at present enter into a consideration of the wisdom and propriety of establishing in this and the other Courts a rules imilar to that used in the Exchequer. (Price, Rep. 4). There the rule is flexible. Although a witness may be held contumacious for continuing in Court after the promulgation of an order requiring him to withdraw, still this does not seem to us to be a matter that calls for the interposition of the Court. The order for the exclusion of the witnesses being made by the Judge at Nisi Prius, it is for him to exercise a discretion. It is entirely a question of Nisi Prius practice.

THOMAS *v.* DAVID, 1836. N. P. *7 C. & P.* 350.

or returning after being ordered out of Court.

IN an action on a note, the witness had been ordered out of Court. Several witnesses were called; and Edward Lloyd, who was the fifth of them, was asked on the voir dire, whether he had not been in Court. He said that he had been in Court during the examination of the last three witnesses, but had not heard the opening of the counsel for the defendant, or any of the evidence adduced on the part of the plaintiff. This witness further stated that he was not aware that he had been ordered out of Court, and had come in when some one called him. It was contended that this witness could not be examined, more especially as it was an Exchequer record, in which Court it is an inflexible rule that no witness who has returned into Court after he has been ordered out can be examined. This was laid down in the case of *Parker* v. *M'William*, (4 M. & P. 480).

Coleridge, J.—The rule you refer to in the Court of Exchequer is confined to revenue cases; in other cases the rule there is the same as it is in the other Courts, namely, that the rejection of the evidence is entirely in the discretion of the Judge; and that being so, I think that, under the particular circumstances of this case, I shall be exercising a sound discretion in receiving the evidence.

COOK *v.* NETHERCOTE, H. T. 1835. N. P. *6 C. & P.* 741.

And a witness returning is no ground for rejecting his evidence;

THE witnesses on both sides had been ordered out of Court. One witness was asked if he had not been in Court after the order.

Alderson, B.—That would be no ground for rejecting his evidence. It would be only matter of observation on his testimony. In one case the Judges granted a new trial, because a witness's evidence had been rejected by reason of his having remained in Court after an order for witnesses to withdraw.

BEAMON *v.* ELLICE, 1831. N. P. 4 *C.* & *P.* 585.

but he should only be examined as to facts not spoken of.

THE witnesses had been all ordered out of Court; but one of them came into Court again, and heard the evidence of another witness. The witness who had so come back into Court—

Taunton, J., allowed to be examined as to such facts only as had not been spoken to by any other witness.

VI. RELATIVE TO THE COMMISSION TO EXAMINE, AND OF INTERROGATORIES.

(*a*) WHEN IT WILL OR WILL NOT BE GRANTED, AND OF THE JURISDICTION OF THE SUPERIOR COURTS.

The 1 Will. 4, c. 22, extends the 13 Geo. 3, c. 63, as to commissions to examine witnesses, to the colonies, and to all actions in the superior Courts at Westminster.

BY 1 Will. 4, c. 22, s. 1, "Whereas great difficulties and delays are often experienced, and sometimes a failure of justice takes place in actions depending in courts of law, by reason of the want of a competent power and authority in the said Courts, to order and enforce the examination of witnesses when the same may be required before the trial of a cause; and whereas, by an act passed in the thirteenth year of the reign of his late Majesty King George the Third, intituled 'An Act for the establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe,' certain powers are given and provisions made for the examination of witnesses in India in the cases therein mentioned, and it is expedient to extend such powers and provisions:" it is therefore enacted, "That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions depending in any of his Majesty's Courts of law at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for."

Courts at Westminster, Lancaster, and Durham may direct a commission within or without their jurisdiction.

By s. 4, it is enacted, "That it shall be lawful to and for each of the said Courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Common Pleas of the county palatine of Durham, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath upon interrogatories or otherwise, before the Master or prothonotary of the said Court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and, by the

same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court where the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

By sect. 11 it is provided, "That no order shall be made in pursuance of this act by a single Judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a Judge of one of the said Courts at Westminster."

A single Judge of the Court of Pleas at Durham cannot make the order.

SAVAGE *v.* BINNY, E. T. 1834. Ex. 2 *D. P. C.* 643.

ON a mandamus to examine witnesses—

The Court of Exchequer held, that they had the same power as the Court of King's Bench, since the 13 Geo. 3, c. 63, s. 44, to issue a mandamus for a commission for the examination of witnesses abroad.

Under 13 Geo. 3, the Court of Exchequer had the same power as the King's Bench.

DUCKETT *v.* WILLIAMS, T. T. 1831. Ex. 1 *C. & J.* 510.

ON a rule under the stat. 1 Will. 4, c. 22, s. 4, to shew cause why a commission should not issue to examine witnesses in France, it was contended that the authority of the Court under the 4th section of the statute was, by the 1st section, confined to cases where the witnesses resided within the King's dominions.

The 1 Will. 4, c. 22, is not limited to witnesses residing within the King's dominions.

Per Cur.—The provisions of the 4th section would be nugatory, did they not apply to a case like the present. The 1st section provides for all places within his Majesty's dominions; but the 4th vests in the Judges a discretion to issue a commission to any place or places out of the jurisdiction of the Court. The issuing of the commission must depend upon the discretion of the Court. But to say that the 4th section only extends to places within his Majesty's dominions would defeat the plainly-expressed intention of the legislature.

NORTON *v.* LAMB, T. T. 1836. C. P. 5 *D. P. C.* 181; S. C. 3 *Bing., N. S.*, 67; S. C. 3 *Scott*, 391.

THIS was an action for criminal conversation with the plaintiff's wife, in which, on a rule, under 1 Will. 4, c. 22, s. 2, for a commission to examine a witness out of the jurisdiction of the Court, it was contended that the present was not a case in which the Court should exercise the discretion vested in them by the statute, inasmuch as the proceedings were of a criminal nature.

An action for crim. con. is a civil action within the 1 Will. 4, c. 22.

Tindal, C. J.—Though this, in some respects, relates to a criminal act, it is in all respects a civil suit; it is in fact a civil action.

ABRAHAM *v.* NEWTON, H. T. 1832. C. P. 8 *Bing.* 274; S. C. 1 *M. & Scott*, 384.

IN this case, the Court, doubting if the power to examine a witness by deposition, under 1 Will. 4, c. 22, s. 1, applied to the case of a woman pregnant, and of impending delivery, refused it, the affidavit not shewing that it would happen about the time of trial, and render the attendance perilous.

But the 1 Will. 4, c. 22, does not apply to a woman pregnant.

LLOYD *v.* KEY, M. T. 1834. Ex. *3 D. P. C. 253.*

If the witness resides at a great distance, his testimony must appear to be material evidence, and admissible.

IN an action on a bill, by the indorsee against the acceptor, the defendant applied for a commission to examine the drawer in Upper Canada, to shew that there was nothing due from the defendant to him, and it was sworn that it was believed that the plaintiff had not given value; but, upon a former hearing before a Judge at chambers, it appeared to him that the plaintiff had given value.

Parke, B.—Where a witness resides at such a great distance as the witness does in the present instance, it ought to be clearly made out, to the satisfaction of the Court, not only that the evidence which the witness is expected to give is material and necessary, but also that it is admissible.

(*b*) OF THE COMMISSIONERS.

The commissioners may enforce the attendance of witnesses.

BY 1 Will. 4, c. 22, s. 2, it is enacted, "Where any writ or commission shall issue under the authority of the 13 Geo. 3, c. 63, or of the powers hereinbefore given by the act, the Judge or Judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of witnesses, as the Court whereof they are Judges does or may possess for that purpose, in suits or causes depending in such Court."

Witnesses may be compelled to attend, and, in default, to be in contempt; but they are to have their expenses.

By s. 5, it is enacted, "That, where any rule or order shall be made for the examination of witnesses within the jurisdiction of the Court wherein the action shall be depending, by authority of this act, it shall be lawful for the Court, or any Judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon had by attachment, (the Judge's order being made a rule of Court before or at the time of the application for an attachment); in addition to the service of the rule or order, an appointment of the time and place of attendance, in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served, together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial; provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause."

Witnesses are to be examined on oath.

By s. 7, it is enacted, "That it shall be lawful for all and every person authorized to take the examination of witnesses by any rule, order, writ, or commission, made or issued in pursuance of this act, and he and they are hereby authorized, to take all such examinations upon the oath of the witnesses, or affirmation, in cases where

affirmation is allowed by law instead of oath, which oath on affirmation is to be administered by the person so authorized, or by any Judge of the Court wherein the action shall be depending; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of Middlesex, if the evidence be given out of England."

Witnesses, prisoners, may be brought up by habeas corpus.

By s. 6, it is enacted, "That it shall be lawful for any sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination, under the authority of this act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any Court or Judge, under such circumstances and in such manner as such Court or Judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum."

If witnesses do not attend, it is to be reported to the Court.

By s. 8, it is enacted, "That it shall and may be lawful for the Master, Prothonotary, or any other persons to be named in any such rule or order, as aforesaid, for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon, or relating thereto; and the Court is hereby authorized to institute such proceedings, and make such order and orders, upon such report, as justice may require, and as may be instituted and made in any case of contempt of the Court."

CLAY *v.* STEPHENSON, T. T. 1833. K. B. 5 *N. & M.* 318.

Under circumstances, the Court will grant the commission without the clause requiring the commissioner to take an oath.

ON a rule calling on the defendants to shew cause why the plaintiff should not be at liberty to issue a commission for the examination of a witness (whose evidence was necessary for his case) at Hamburgh, upon interrogatories to be directed to the Judges of the Court of Commerce at Hamburgh, and why, in such commission, the usual clause rendering the commissioners' oath necessary should not be omitted, or otherwise, why the commissioners to be named in the said commission should not, if necessary, and in their capacity of commissioners appointed by this Court, and in the name of this Court, be authorized to apply to the said Court of Commerce, or other proper tribunal, at Hamburgh, to render the said commission effectual, by compelling the attendance of witnesses, and obliging them to be examined upon oath; and also, why, if necessary, a clause authorizing such application should not be inserted in the said commission. It appeared, by the affidavits, that in this case a commission had issued to certain individuals at Hamburgh, to examine witnesses under 1 Will. 4, c. 22; that that commission was rendered ineffectual by reason of three of the witnesses who were necessary to the plaintiff's case refusing to attend before the commissioners to be sworn and give evidence; that two of the commissioners exhibited a commission to the Court, praying the Court to lend them their assistance, and enable them to enforce the attendance of witnesses, but that the Court decided that the request could not be complied with. It was also stated, in the affidavits, that it was believed, that, if this Court would direct its commission to

the Court of Commerce at Hamburgh, omitting the clause calling on the Court, as such commissioners, to make the usual oath as commissioners, and framed as a commission addressed to a Court of judicature, to whose acts full faith is due; or if this Court would, by its rule, request the Court of Commerce at Hamburgh to give effect to the commission; or if the commissioners to be named in the commission were authorized, by the rule of this Court, by a clause to be inserted in the commission, enabling the commissioners in that respect to apply, in the name or on the part of this Court, to the Court of Commerce, to give effect to the commission, by compelling the attendance of the witnesses before the commissioners, to be sworn and submit to be examined, that then such commission might be made available.

Per Cur.—We are of opinion that this may be done. There are no words in the act which authorize us to say that the commissioners must be sworn, when it appears that, if the commission be directed to certain individuals, and the clause requiring them to be sworn be omitted, they will have no difficulty in acting under it, and of exercising the power which they possess of compelling the witnesses to be sworn and give evidence.

POND *v.* DIMES, E. T. 1833. C. P. 3 *M. & Scott*, 161.

The Prothonotary may examine vivâ voce in case of illness*.

IN this case the Court allowed the examination of a party to be taken by the Prothonotary vivâ voce, under 1 Will. 4, c. 22, upon an affidavit by his medical attendant, that "his life was then in a very precarious state."

(*c*) OF THE AFFIDAVIT TO OBTAIN.

GUNTER *v.* M'KEAR, H. T. 1836. Ex. 4 *D. P. C.* 722; S. C. 1 *M. & W.* 201; S. C. 1 *T. & G.* 245.

To obtain the conveyance the affidavit must state the names of the witnesses proposed to be examined†;

ASSUMPSIT against the defendants for discharging the plaintiff out of their service, after engaging him as a supercargo on board a vessel to go to China. They pleaded, as a justification, that, after having engaged him, they discovered that he had been guilty of improper conduct towards a married lady in Jamaica, and therefore they discharged him. Issue was joined on this plea. On motion for a commission to examine witnesses, on an affidavit, which alleged that the defendants had been informed that the plaintiff had seduced a married lady in Jamaica, and that her husband had in consequence shot himself, and then continued, "that several persons now residing in the said island, but whose names are at present unknown to the said deponent, are cognisant of the facts before stated, and are material and necessary witnesses; that they are all resident in the said island, and will not, as they believe, be in England"—

* A rule to examine, on interrogatories, a witness alleged to be confined to her bed by infirmity, refused, without the affidavit of a surgeon stating the nature of the complaint, and belief that the witness would never be able to attend the trial. (*Davis* v. *Lowndes*, M. T. 1838, C. P., 7 D. P. C. 101).

† A rule to examine witnesses abroad, under 1 Will. 4, c. 22, s. 4, will be granted, if the names of some of the witnesses proposed to be examined are mentioned in the affidavits, although the names of others are not. (*Beresford* v. *Easthope*, H. T. 1840, B. C., 8 D. P. C. 294; S. P. *Dimond* v. *Vallance*, E. T. 1839, B. C., 7 Id. 590; post, p. 741.)

Per Cur.—We never knew an application of this kind to be made without the names of the witnesses who were to be examined being specified, or the witnesses themselves in some way described.

BADDELEY *v.* GILMORE, H. T. 1836. EX. 1 *M. & W.* 55; S. C. 1 *T. & G.* 369.

but an affidavit of merits need not be produced.

IN an action for wages, to which the defendant pleaded that they were forfeited by the plaintiff in consequence of his mutinous conduct, the defendant had obtained a rule nisi, under 1 Will. 4, c. 22, for a commission to examine witnesses at Sydney, in New South Wales, where, according to the affidavits, the mutiny took place, the vessel on board of which the plaintiff had served having been engaged in the conveyance of emigrants. His affidavit stated that the witnesses, whose names were given, were resident at that place, and were material for the defence. On shewing cause against the rule, it was contended that the Court would not grant the commission without an affidavit as to merits, and that the application was made bonâ fide, and not for the purpose of delay; and the case of *Lloyd* v. *Key* (3 D. P. C. 253) was referred to.

The Court held, that it was not necessary, on the part of the defendant, that there should be such an affidavit, it appearing sufficiently from those produced that the application was made bonâ fide.—Rule absolute.

(*d*) RULE FOR.

CUNLIFFE *v.* WHITEHEAD, E. T. 1835. C. P. 3 *D. P. C.* 634.

It will not be made a part of the rule that a document shall be produced*.

ON a rule for a commission to examine witnesses at Boulogne, and why plaintiff should not be compelled to produce certain bills of exchange at the examination—

Per Cur.—We cannot order a plaintiff to send his documents abroad, for the application might be made on a question of title, and the plaintiff might be compelled, on such a principle, to send his title-deeds to Australia.

WEEKES *v.* PALL, H. T. 1838. C. P. 6 *D. P. C.* 462.

A plaintiff not proceeding promptly is no ground for discharging a rule to examine a witness on interrogatories.

ON shewing cause against a rule for examining, on interrogatories, a witness whose evidence was sworn to be material and necessary for the plaintiff in the action, and who was on the point of sailing for the island of Ceylon, there was no objection to the application, provided the Court should think the plaintiff was in time. The action had been commenced in April, 1836, and the defendant had pleaded in the following May, but no steps in the cause were afterwards taken until the 1st of November, 1837, when notice was

* It is not necessary, on applying for a rule nisi, under 1 Will. 4, c. 22, s. 4, for a commission to examine witnesses out of the jurisdiction, to state the names of the examiners. (*Fearon* v. *White*, T. T. 1837, B. C., 5 D. P. C. 713). In an application to examine witnesses abroad by a commission under 1 Will. 4, c. 2, s. 4, the Court will allow the commission to go for the examination of witnesses not named in the rule, if the names of certain witnesses are given. (*Dimond* v. *Vallance*, E. T. 1839, B. C., 7 D. P. C. 590).

given that the plaintiff intended to proceed after the end of that month. He did not go on until the month of January, 1838.

Per Cur.—We think the objection is not sufficient.—Rule absolute.

(*e*) Return of.

STEINKELLER *v.* NEWTON, E. T. 1840. C. P. 8 *D. P. C.* 579; S. C. 1 *Scott, N. S.*, 148.

The commission must be returned within the time implied under the order granting it.

IN this action against the defendant, for a breach of contract in not delivering a certain quantity of spelter, a verdict passed for the plaintiff, with 500*l.* damages. A rule was moved for, on the part of the plaintiff, for setting it aside, on the ground of the improper production by the defendant of a deposition taken under a commission at Hamburgh, in consequence of which the damages were reduced below a proper estimate, and were less than they otherwise would have been. The application was made under the following circumstances:—The cause first came on for trial at the sittings after Michaelmas Term, 1837, in London, on the 22nd of December, when it was postponed to the sittings after Hilary Term, on account of the absence of a material witness, for whose examination at Hamburgh a commission was granted. The order under which the commission issued bore date the 22nd of December, 1837, and it directed that the cause should be made a remanet to the sitttings after the next Hilary Term; but the commission was not issued until the following June, returnable in November. Upon obtaining the commission the defendant gave the plaintiff notice of the fact, and required him to join in it. This, however, the plaintiff did not do; upon which the defendant proceeded to execute the commission, and offered in evidence at the trial, before *Tindal*, C. J., the deposition complained of, and which, though objected to on the part of the plaintiff, was received in evidence.

Per Tindal, C. J.—As it appears to me, the depositions which were given in evidence at the trial at Nisi Prius, before me, were taken under a commission obtained in consequence of the irregularity of the defendant's attorney. When we look at the terms of the order under which the commission was granted, it is impossible not to see that it was intended that the trial should take place at the sittings after Hilary Term. At first the intention was that the trial should be had at the sittings in term; then, by a subsequent order, a slight alteration was made, and the case was directed to be remanet as above stated. Now, this of itself implies that the commission should have been returned at the sittings after Hilary Term. The commission issued under the seal of the Court in June, returnable in the ensuing November. I will not inquire farther into the question of mala fides; but, as the commission was issued without authority, in consequence of the irregularity to which I have referred, the former trial should be set aside; and justice to both parties will, I think, be best answered by making the rule for a new trial absolute, the costs to be costs in the cause. If the plaintiff succeed the second time, he will be entitled to the costs of the trial.

SPARKES *v.* BARRETT, M. T. 1837. C. P. 3 *Scott*, 402.

If the application is made with intent to delay, the time will be limited.

IN this case delay had been occasioned by the refusal of the defendant to accept an amended issue, and the object appeared to be to delay the plaintiff.

The Court, in granting a commission abroad to examine the defendant's witnesses, ordered the money to be brought into Court, and limited the time for the return of the commission.

(*f*) OF ITS BEING RECEIVED IN EVIDENCE.

Restrictions as to the reading of examinations or depositions without consent of the party.

BY 1 Will. 4, c. 22, s. 10, it is enacted, "That no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the commissioners, Master, Prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

CLAY *v.* STEPHENSON, T. T. 1835. K. B. 3 *Ad. & E.* 807.

A copy from a foreign Court is not evidence.

A COMMISSION, directed to the Judges of a Court at Hamburgh, directed them to examine certain witnesses, reduce their examinations into writing on paper, and return the same to the Court of King's Bench. They returned a copy of the depositions, certified by an officer of the Court to be a correct extract. *Denman*, C. J., received the depositions in evidence, and directed a verdict to be taken for the plaintiff, but gave the defendant's counsel leave to enter a nonsuit.

Per Cur.—We decide this case on one short ground: the principal evidence produced in the case was the depositions. The commission required that the examination of the witnesses should be taken, and reduced to writing on paper, and that *the same* should be returned. Now, it is quite clear that *the same* was not returned, but an extract, made by a clerk. We think we ought not to inquire whether it was made by a proper officer or not. We issue a commission requiring a certain thing to be returned; the thing we require ought to be returned. The copy, therefore, was not receivable in evidence, and there must be a new trial.—Rule absolute.

PROCTOR *v.* LAINSON, M. T. 1836. N. P. 7 *C. & P.* 629.

And interrogatories are not evidence, unless shewn that the witnesses are abroad *.

IN this case it was proposed to read, for the plaintiff, the depositions of A. B. and C. D., taken before the Master under a Judge's order, in expectation of their going abroad.

Per Lord *Abinger*, C. B.—Under a Judge's order, witnesses are

* Where the answer returned by the commissioners, under 1 Will. 4, c. 22, is inadmissible as evidence, it will be struck out, and so of illegal questions; but the party putting a question must take the answer. (*Hutchinson* v. *Bernard*, 1836, N. P., 2 M. & Rob. 1).

examined as much for one side as the other. It must be shewn they are abroad, before the depositions can be read.

(*g*) Costs.

Costs to be discretionary;

By 1 Will. 4, c. 22, s. 3, it is enacted, "That the costs of every writ or commission to be issued under the authority of the 13 Geo. 3, c. 63, or of the powers hereinbefore given by this act, in any action at law depending in either of the said Courts at Westminster, and of the proceedings thereon, shall be in the discretion of the Court issuing the same."

but costs of the order for the commission to be costs in the cause,

By sect. 9, it is enacted, "That the costs of every rule or order, to be made for the examination of witnesses, under any commission or otherwise, by virtue of this act, and of the proceedings thereupon, shall (except in the case in the statute provided for) be costs in the cause, unless otherwise directed either by the Judge making such rule or order, by the Judge before whom the cause may be tried, or by the Court."

PRINCE *v.* SAMO, T. T. 1835. B. C. 4 *D. P. C.* 5.

unless some special ground be shewn.

ON an application under 1 Will. 4, c. 22, s. 4, the only objection taken to the application was, that it should be made a term on which the rule was to be granted, that the costs of the commission should be paid by the defendant, at whose instance the rule had been obtained.

Coleridge, J.—By sect. 9 of the statute, those costs are directed to be costs in the cause, unless otherwise directed. No reason is here given for altering the usual course of such costs being costs in the cause; and therefore the rule must be made absolute, without the introduction of any condition.

BRIDGES *v.* FISHER, H. T. 1835. C. P. 1 *Bing., N. S.*, 510; S. C. 1 *Scott*, 485.

Under circumstances, the Court will refuse to give the costs of a commission to examine witnesses to the party obtaining the verdict.

THIS was an action in which a verdict passed for the defendant, originating in the following circumstances:—Sir J. Bridges and a person named M'Donald were appointed to distribute certain Portuguese prize-money, and the defendant, by desire of M'Donald, was authorized to draw cheques for the money. M'Donald became bankrupt, and it was discovered that considerable sums had been drawn through the instrumentality of the defendant, and applied to purposes different from those intended, and to which the money was appropriated. Upon the trial, the defendant's objection was the authority given by M'Donald; and he, having gone abroad, was examined under a commission obtained by the defendant, and was also cross-examined by the plaintiff. On a rule calling on the plaintiff to shew cause why he should not pay the costs of the commission—

Per Cur.—This question may be decided without raising or discussing the point, whether a witness examined abroad, under a commission issued by the authority of this Court, was interested or not; that is, whether the objection, taken on the ground of the verdict being evidence against him on a future occasion, and consequently that he was interested in the event of the cause, was valid

or not. The recital of the statute under which the commission issued shews that it was the object and intention of the legislature to avoid the expenses and delay which existed before the enactment, and which were occasioned by the necessity imposed upon the party of applying, during the progress of a cause, to a Court of equity. Every one knows the course to have been, that, when a witness resided abroad, it was necessary for the one party in a cause to file his bill in the Court of equity against his opponent, and to produce a commission to have that witness examined abroad; and, during the period of such examination, the suit at law was suspended, and no further proceedings taken upon it. Under such circumstances it was considered as a great boon to the subject to suffer him to make an application to the Court out of which the process was issued, and in which the proceedings were carried on. The recital of the act, 1 Will. 4, c. 22, shews this to be the case. It gives to every Court the authority referred to. Now, for the purpose of coming to a correct conclusion, let us consider the facts of the case, and how these facts may be said to render the granting of the application a matter of justice. The first point for our consideration is, what the practice was, as to the costs of the commission, before the act. Every one knows, that, when the application was made to the Court of equity, the party making it was liable to pay costs, whether he succeeded or not. It was thought to be a sufficient boon to the party, that he was enabled, without producing his witness, to submit his depositions to the jury, and enable him to have their judgment on the subject. This, as it appears to us, is an exercise of discretion, which should be carefully watched and guarded, in consequence of the advantage obtained by the party. Now, adverting to the particular circumstances of this case, the defendant had, in our opinion, a great advantage in being allowed to examine M'Donald abroad, without bringing him before the jury. Let us look to the situation in which the defendant was placed, and the position which he occupied: he was M'Donald's private clerk in the management of that business which forms the subject of this discussion. It is clear, that, in the transactions respecting the money sought to be recovered, the relation of master and servant existed between him and the witness. Now, we are far from supposing that the defendant was liable to any, the slightest, impeachment, more especially as there has been a verdict in his favour; but still there would be reason to receive M'Donald's evidence, if given, with strong suspicion. It would be open to much observation. The defendant was the instrument through which the money sought to be recovered was received. Looking at the case in this point of view, the issuing of the commission was for his benefit; and, under the particular circumstances of the case, he should not call on the opposite party to pay his expenses.

(*h*) Staying of, and quashing*.

* The Court will not stay the issuing of a commission to examine witnesses abroad, on the ground of the plaintiff being indebted to the defendant for certain costs in equity. (*Oughgan* v. *Parish*, T. T. 1835, B. C., 4 D. P. C. 29). The Court will grant a rule absolute, in the first instance, for quashing a commission

VII. RELATIVE TO SECONDARY EVIDENCE IN RELATION OF. See, also, tit. *Evidence.*

WYATT *v.* BATEMAN, T. T. 1836. N. P. *7 C. & P.* 586.

If a witness has enlisted, and gone to India, parol evidence may be given*.

AN attesting witness was not called; but, to lay a foundation for letting in evidence of his handwriting, his father was called, who stated, on his examination in chief, that his son was on his way to India. From his cross-examination it appeared that his son and he had parted upon bad terms; that the son had afterwards enlisted into the 11th Regiment of Dragoons; and that the father, upon inquiry at the War-office, was informed that the regiment had sailed for India.

Coleridge, J., was of opinion that the evidence was sufficient to let in proof of the witness's handwriting.

VIII. RELATIVE TO THE COMMITTAL AND PRIVILEGE OF.

REX *v.* WIGLEY, H. T. 1835. N. P. *7 C. & P.* 4.

A witness committed for contempt, after discharge, is privileged from arrest†.

A WITNESS, after he had left the Court, in the lobby struck the defendant, and was brought into Court in custody.

Per Coleridge, J.—You stand committed to the custody of the Marshal for a contempt of this Court. Your committal is for three days; and, in consequence of a statement that has been made, I think it right to inform you that the same privilege from arrest, which, as a witness, you would have enjoyed in returning from this Court to your own house, you will have a right to on the expiration of your imprisonment, in going to your own house from the prison to which you are committed.

IX. RELATIVE TO CRIMINAL PROCEEDINGS. See, also, tit. *Indictment.*

REX *v.* ST. GEORGE, 1840. N. P. *9 C. & P.* 488.

A witness may be asked whether he has not used violent language to-

ON the trial of A. for attempting to discharge loaded arms at B., B. (with a view to discredit his evidence) was cross-examined as to whether he had not used violent language towards his father, which he admitted he had.

to examine witnesses pursuant to 1 Will. 4, c. 22, s. 6, where the commission has been granted, and the application is made at the instance of the plaintiff. (*Hodges* v. *Daly*, H. T. 1840, B. C., 8 D. P. C. 308).

* To account for not calling a subscribing witness, evidence cannot be given of his declarations as to where he lived; to let in proof of that, in answer to an inquiry there, it was stated that he was abroad; but some person should either be called from the house where the witness lived, or else some person who had seen him abroad. (*Doe* d. *Beard* v. *Powell*, M. T. 1836, N. P., 7 C. & P. 617).

† A party attending the Court of Review in bankruptcy—Held, privileged from arrest, notwithstanding a slight deviation from the straight course on his way home. (*Ex parte Clarke*, 1 D. & C. 99).

Parke, B., held, that, on re-examination, B. might be asked as to how his father had acted towards him before he used the language that had been cross-examined to. It was proposed to ask a witness as to what another witness had said on other occasions than that which was the subject of the trial. *Parke*, B., held, that that could not be done, as what a witness has said at other times is only matter for the cross-examination of the witness himself.

wards the prisoner*.

REX *v.* BISPHAM, 1830. O. B. 4 *C. & P.* 392.

INDICTMENT for forgery. For the defendant, a witness was called, who stated that he had known a witness who had been examined for three years, and would not believe him on his oath.

Garrow, B.—You have known him three years; have you such a knowledge of his general character and conduct that you can conscientiously say, that, from what you know of him, it is impossible to place the least reliance on the truth of any statement that he may make?

A witness may be asked whether he will believe another witness on his oath.

REX *v.* BALL, 1839. N. P. 8 *C. & P.* 745.

COUNSEL for the prosecution contended that certain facts were sufficient to raise an inference of hostility on the part of the witness towards the prosecutor, and a bias in favour of the prisoner, so as to entitle him to cross-examine her.

Erskine, J.—I think that the situation in which this witness stands towards either party does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such nature as to make it appear that she was an unwilling witness.

A party cannot cross-examine his own witness, unless unwilling.

REX *v.* DUNCOMBE, H. T. 1838. N. P. 8 *C. & P.* 369.

INDICTMENT for a libel. Counsel for the defendant, (having handed a paper to the witness, which the witness stated to be the same), "Look at that paper, and tell me whether you did not order Nos. 3 and 4 of a magazine, saying that you had No. 2." The witness, (having looked at the paper), "I did not." Counsel for the prosecution applied to see the paper.

Per Denman, C. J.—I take the distinction to be this: if a paper is put into a witness's hand, and it leads to any thing, that is, if any thing comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the thing misses entirely, and nothing comes of it, the opposite counsel has no right to look at it.

A paper produced on cross-examination cannot be seen by the prosecutor if nothing comes from it.

* When principal witness, as the prosecutor, does not understand the nature of an oath, prisoner should be acquitted, and not the jury discharged. (*Rex* v. *Wade*, 1825, 1 Moo. C. C. 86).

In grand larceny, if the sentence be imprisonment without burning in the hand, whipping, (now abolished), or hard labour, fining is also necessary, otherwise the prisoner will not be restored to his competency when he has suffered his punishment. (*Rex* v. *Harling*, 1824, 1 Moo. C. C. 39).

The Judge at the trial of a cause cannot order any paper to be impounded which is not given in evidence. It is not enough that it should be in Court in the possession of one of the witnesses. (*Rex* v. *Clifford*, M. T. 1824, N. P., 1 C. & P. 521).

REX *v.* SLANEY, H. T. 1832. N. P. 5 *C. & P.* 213.

A witness is not bound to answer a question which would even tend to criminate him*.

ON an information for a libel—

Lord *Tenterden*, C. J., said,—You can not only not compel a witness to answer that which will criminate him, but that which tends to criminate him; and the reason is this, that the party would go from one question to another, and, though no question might be asked, the answer of which would directly criminate the witness, yet the answer might be enough whereon to found a charge against him.

REX *v.* COLLEY, 1829. N. P. 1 *M. & M.* 329.

A witness may be examined though he has remained in Court after an order to leave.

ON an indictment for burglary, the witnesses were ordered out of Court; but one of the witnesses for the prosecution, who had retired upon hearing the order, was afterwards, during the evidence of the prosecutor, called in to produce a plan of the premises, and, instead of again retiring, waited in Court and heard some witnesses examined.

Littledale, J., said, that it depended on the circumstances of the case whether such a witness ought to be examined, and that he should receive this witness.

REX *v.* RAMSDEN, E. T. 1827. N. P. 2 *C. & P.* 603.

If a paper be given to a witness to refresh his memory, the opposite counsel is entitled to see it.

INDICTMENT for a conspiracy. Counsel put a paper into the witness's hand, which he acknowledged to be of his handwriting, and then asked him if he had not bought the debt nine months before, which he admitted he had. The opposite counsel applied to see it.

Lord *Tenterden*, C. J.—You put the paper into the witness's hands to refresh his memory. It is very usual for the opposite counsel to see it, and examine upon it, and I think he has a right to see it.

REX *v.* BARNES, 1835. N. P. 7 *C. & P.* 166.

Under 7 & 8 Geo. 4, rewards may be given, though the witness has incurred no expense.

ON an indictment for burglary, application was made to *Coleridge*, J., to grant a reward to the son of the prosecutor, under the stat. 7 Geo. 4, c. 64, s. 28.

Coleridge, J.—I remember that the Judges on the special commission at Bristol ordered rewards under this act, in several instances, to be paid to persons who displayed great courage, but who, like the witness in the present case, had not been put to any expense; I think, therefore, that I ought to grant a reward. Let a reward of £5 be paid to the witness.—Order accordingly.

REX *v.* STRETCH, T. T. 1835. 5 *N. & M.* 178.

In a criminal case the attachment for non-attendance should be moved in the term next after the trial.

AN indictment was tried on 11th December, and a rule nisi for an attachment against a witness for disobedience to a subpœna was moved for and obtained in Easter Term.

Lord *Denman*, C. J.—It is not necessary to enter into the other

* The privilege of not answering a question which the witness fears may subject him to criminal proceedings is that of the witness, and not of the party:—The Court held, therefore, that counsel ought not to be allowed to argue in support of the objection. (*Rex* v. *Adey*, 1830, N. P., 2 M. & M. 94).

points which have been discussed. It seems to me to be quite a sufficient ground for discharging this rule, that too long time was suffered to elapse before the rule was moved for, and that an application has been made against other parties, without the absence of this party being referred to. Applications of this sort should be made promptly. This rule should have been moved for in Hilary Term.

Words. See tit. *Slander.*

Work and Labour.

I. RELATIVE TO WHEN AN ACTION FOR CAN OR CANNOT BE MAINTAINED, p. 749.

II. RELATIVE TO THE FORM OF ACTION, p. 752.

III. RELATIVE TO INSPECTION OF THE WORK, p. 753.

IV. RELATIVE TO THE PLEADINGS AND EVIDENCE, p. 753.

V. RELATIVE TO DAMAGES, p. 755.

VI. RELATIVE TO, IN PARTICULAR. See tits.

Apothecary.
Apprentice,
Arbitration,
Attorney,
Auction and Auctioneer,
Banker,
Bankrupt,
Joint-Stock Company,
Master and Servant,
Physician,
Principal and Agent,
Prisoner,
Sheriff,
Ship and Shipping,
Witness.

I. RELATIVE TO WHEN AN ACTION FOR, CAN OR CANNOT BE MAINTAINED.

HUGHES *v.* LENNY, E. T. 1839. Ex. 5 *M. & W.* 183.

An action for work and labour lies after the plaintiff has tendered the work done on payment of his bill.

THE plaintiff contracted to survey a parish for the defendants, and to enter his measurements, and make a plan, in books and upon paper furnished by them. He finished his work, and upon the 7th of July, 1838, sent in his bill, and offered to deliver the books and plan upon payment of 204*l.* Upon the 17th the parties met, and the plaintiff offered to deliver the books and plan on payment of his bill, but the defendants refused to pay that sum, when the plaintiff asked them to make a tender, but they offered nothing. The rate and mode of payment was disputed between the parties. The plaintiff would not deliver the plan and books without payment, and on the same day commenced an action of indebitatus

assumpsit for his bill. The jury found that the payment was to be made by the average, and not by the time, and gave 7*d.* per acre throughout.

Per Cur.—The question in the case is, whether a debt, in respect of which an action of indebitatus assumpsit will lie, is due from the defendants to the plaintiff. In order to determine that, it is necessary to see what the real contract between the parties was. The defendants employed the plaintiff to survey the parish of Gazeley, in Suffolk, and to enter the results of his survey in books first, and afterwards to make a map of the parish upon paper, furnished to him for that purpose by the defendants. It must also be taken, and, indeed, is conceded by the plaintiff, to have been incidental to the contract, that, before the defendants are required to pay for these services of the plaintiff, they are to have reasonable time and opportunity for looking over the work and inspecting the map and plans. That was the contract. But the defendants say, further, that it was also a part of it that the plaintiff must be ready and willing to deliver the map and books before he can bring his action; but we think that that is no part of the contract, but is quite independent of and separate from it. Here, articles of the defendants are delivered to be wrought upon by the plaintiff, as is the case where cloth is delivered to a tailor to be made up; who, when he has worked it up, and given the owner an opportunity of seeing and judging of it in its finished state, may tender his bill, and proceed to recover the price, and still retain the article for his lien for his labour. The defendant, in such a case, might also sue upon an implied contract to return the article upon request; but, before doing so, he must tender what the party is entitled to for his work and labour. Here, no sum has been tendered by the defendants. As soon as the work was concluded, and a reasonable opportunity for inspecting it had been afforded, we are of opinion that the plaintiff was in a condition to maintain an action. The question then is, whether, upon the facts proved, either at the close of the plaintiff's case or of the defendant's, there was evidence from which the jury might infer that the plaintiff had performed all that he was required to do; as, if so, there was no ground for a nonsuit. We think there was such evidence. The principal struggle in the argument here has been, whether the defendants had a reasonable opportunity of testing the work. There certainly was evidence for the jury of such an opportunity; and, at the trial, the defendants did not rest their case upon the want of it. It appears that the work was done, and notice given of it to the defendants, on the 7th of July, and it is not until the 17th, when no notice has been taken of the communication, that an action is commenced. There was that interval for any inquiry, or for examination of the work. We therefore think that the plaintiff was then entitled to maintain an action in respect of a debt. It is unnecessary to inquire whether the plaintiff was ready and willing to deliver up the maps and books, upon the offer of a reasonable sum for his labour, as we have already said that we do not consider that that was any part of the contract; but, if that was part of the contract, there was also some evidence of his performance of that part, by his requiring the agents of the defendants to make him a tender, when the plaintiff's demand of 204*l.* was refused; but we do not think the contract required him to take that step.

ROBERTS *v.* HAVELOCK, E. T. 1832. K. B. 3 *B. & Ad.* 404.

THE plaintiff, a shipwright, was employed to do the repairs of a ship, which, in the course of a voyage, received damage, but there was no specific contract to do the whole, and make no demand until completed.

As the plaintiff may insist on being paid as he goes on.

The Court held, that, upon a dispute arising, the plaintiff was entitled to refuse to proceed until paid for what was already done.

REX *v.* PETO, M. T. 1826. Ex. 1 *Y. & J.* 37.

UPON a bond conditioned for the sufficiently executing certain works according to plans and specifications, subject to the directions of a surveyor on the part of the obligees, as to any extra works to be done or omitted, and upon oyer of the condition, &c., issue was joined, upon the authority of the surveyor, to vary the specification in the manner proved, and which went to the subversion of the whole scheme, and, in consequence of which, the injury sustained in fact arose. It appearing, from the whole tenor of the instrument, that the alterations and extra works, and articles to be dispensed with in the judgment of such surveyor, were intended only to refer to such specification—

Where work is to be done under the superintendence of a surveyor, he cannot vary so from the specification as to entirely change the nature of the work.

The Court held, that it could not be considered as affording a power to the surveyor to entirely vary and substitute a different foundation for the building; and, consequently, the breach of the condition being admitted, and the only excuse for not performing his engagement failing, if such authority did not exist, the obligor was entitled to judgment.

CHANTER *v.* HOPKINS, M. T. 1838. Ex. 4 *M. & W.* 399.

THE defendant sent to the plaintiff the following order: "Send me your patent hopper and apparatus, to fit up my brewing copper, with your smoke-consuming furnace." The furnace, as ordered, was sent and put up in the brewery. In an action of assumpsit for the price which had been agreed upon, the jury found that the smoke-consuming furnace was useless to the defendant for his brewery, but were directed by *Gurney*, B., to find a verdict for the plaintiff. On motion for a new trial—

When a machine is made to order, and no guarantie that it should be fit for a particular purpose, the plaintiff may recover, though it does not answer.

Per Cur.—A great confusion has arisen in some of the cases from an incautious use of the word "warranty." A warranty is an express statement of something which the party signing it undertakes to perform; and, though it is part of a contract, may yet be properly said to be collateral to it. In some cases, where a party has contracted to sell a particular thing, it has been said that there is a warranty; but that is a misapplication of the word, and if the article contracted for is not furnished, there is a remedy for the breach of contract, but it cannot be correctly said that the party warrants the article. So, in the case of *Gray* v. *Cox*, (4 B. & C. 108), if copper was not furnished fit for sheathing a ship, the contract was not performed; but it is incorrect to introduce the term "warranty" where none is shewn. Now, let us see what is the contract here, and whether the order has not been complied with in its terms. The order is for one of those patent smoke-consuming furnaces of which the plaintiff is known to be the patentee. It is admitted that there

was no fraud on the part of the plaintiff. If, indeed, it were shewn that the plaintiff knew, when the order was taken, that the smoke-consuming furnace was not applicable to the purpose for which it was intended, that might be a ground on which to vitiate the contract, inasmuch as the plaintiff had concealed a material fact; but this is a mere order for a specific chattel, and the plaintiff gives no undertaking or warranty that it shall suit the defendant's brewery; if it does not, still the defendant has got what he bargained for, and must pay for it. We therefore see no ground for disturbing the verdict.

MONEYPENNY *v.* HARTLAND, T. T. 1826. N. P. 2 *C. & P.* 378. —S. P. COUSENS *v.* PADDON, M. T. 1835. Ex. *C., M., & R.* 547; S. C. 4 *D. P. C.* 488.

But a party cannot recover for work which is of no value*.

IN an action for work and labour—

Best, C. J., said,—If an engineer is employed by a committee for erecting a bridge, and forming a road to it, to make an estimate of the expense of the works, and makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it, and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a greater expense, he is not entitled to recover any thing for his trouble in making such estimate.

II. RELATIVE TO THE FORM OF ACTION.

SMITH v. WHITE, H. T. 1840. C. P. 8 *D. P. C.* 255; S. C. 6 *Bing. N. S.* 255.

A party who undertakes to perform work, and pawns part of the materials, may be sued in tort.

IN case, the declaration alleged, that, in consequence of a retainer and employment by the plaintiff, at the request of the defendant, the defendant undertook to print a certain book with all reasonable expedition, and to apply to the work a certain quantity of paper given to him by the plaintiff for such purpose. It then set forth that the defendant did not regard his duty in that behalf, and did not print the work with reasonable despatch; but, on the contrary, neglected and delayed the printing; and, contriving to prejudice the plaintiff, applied the paper to a purpose different from that for which it was given, and, without the permission, and contrary to the intention, of the plaintiff, wrongfully pawned the same. On special demurrer—

Per Cur.—This, it should be recollected, is not a general, but a special demurrer, setting forth particular reasons for the objections which have been advanced. The precise form of laying the breach is not made the ground of objection; but the real and substantial question for the consideration of the Court is, whether this is not a tortious breach of contract, or violation of the duty undertaken to be performed on his entering into the agreement. The goods were deposited with the defendant for a specific purpose; they were placed in his possession by the plaintiff in a lawful manner; and

* Where a party is employed in a work of skill, which he totally fails to accomplish, so that his employer derives no benefit:—Held, that he was not entitled to maintain the action for work and labour. (*Duncan* v. *Blundell*, 1819, N. P., 3 Stark. 6).

during the time he was so possessed, and whilst they were thus in his hands, he unlawfully pledged them. Was not this a tortious act done in violation of the contract which he took upon him to perform? By placing the goods, under such circumstances, in the hands of another, the defendant was guilty of a tortious misappropriation, not founded upon the contract. In our opinion, this demurrer is not good.

III. RELATIVE TO THE INSPECTION OF THE WORK.

Turquand *v.* Strand Union, T. T. 1840. Ex. 8 *D. P. C.* 201.

In an action for work and labour, by assignees of a bankrupt, a summons was taken out before *Rolfe*, B., to allow the plaintiff's attorney, the bankrupt, and any number of witnesses on his behalf, not exceeding four, to examine the work and materials provided by the bankrupt. The summons was opposed by the defendants, but the Judge made an order accordingly.

In an action for work, &c., a judge cannot order that witnesses be allowed to inspect.

Per Cur.—The order, if valid, might, upon disobedience to it, be enforced by attachment. Here it is evidently an order which a Judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the Court has no power to enforce it.

IV. RELATIVE TO THE PLEADINGS* AND EVIDENCE.

Grainger *v.* Raybould, 1840. N. P. 9 *C. & P.* 229.

In an action for work and labour, for the plaintiff, evidence was given that his workmen put up a boiler and a tube at the defendant's mine, and 4*s.* a day was stated to be a fair price for each man so employed. The defendant proposed to shew, that, during the time the men were at work, the defendant provided them with beer.

A set-off may be given in evidence in reduction of wages, though not pleaded†.

Patteson, J.—I think that the evidence is receivable. The plaintiff goes on a quantum meruit, and it may be that he will deserve to have less if the defendant supplied his men with beer, than if the plaintiff himself had supplied the beer.

Jones *v.* Howell, T. T. 1835. Ex. 4 *D. P. C.* 176.

An action was brought by a builder for the amount of extra work done, there having been a contract between the parties.

In action for extra work, if there is a contract, it should be produced.

The Court held, that the plaintiff ought to have produced the written contract at the trial, in order that it might appear what was within the contract and what not; but, as the objection was not taken by the defendant at the trial, the Court set aside the verdict which the jury had found for the defendant, and ordered a new trial, without costs.

* As to the plea, see also ante, tits. *Non Assumpsit—Nunquam indebitatus.*

† But see Reg. Gen. H. T., 4 Will. 4, See tit. *Set-off.*

VINCENT *v.* COLE, M. T. 1828. N. P. 1 *M. & M.* 257; S. C. 3 *C. & P.* 481.

An unstamped contract cannot be looked at.

A. HAD built a house for B., under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract.

The Court held, that they could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited.

BRADLEY *v.* MILNER, E. T. 1835. C. P. 1 *Bing., N. S.*, 644.

If work is to be done to satisfaction of third party, it must be shewn to be approved of by him*.

IN an action for goods sold and delivered, work and labour, &c., the defendant pleaded that the work, &c. was not to be paid for until approved of by defendant or his surveyor, and that the work had not been approved of by him or his surveyor. In the replication, the plaintiff alleged that the work was done to the satisfaction of the defendant and his surveyor, and added the special traverse in the words of the plea; absque hoc, that the work was not done to the satisfaction of the defendant or his surveyor. Upon verdict for plaintiff—

Per Cur.—This was an action for work and labour, and the defendant pleaded that he was not to be called upon by the plaintiff for payment until the work was performed to the satisfaction of the defendant *or* of his surveyor; and he goes on to allege that the work &c. was not performed to the satisfaction of the defendant or of his surveyor, and, therefore, that it amounted to a non-compliance with the agreement. To this the plaintiff replies, not, as he might have done, in the very words of the agreement, the meaning of the parties being clearly that the work should be done to the satisfaction of the defendant *or* of his surveyor, but he states what, in pleading, is termed inducement, that the work was done to the satisfaction of both; and then he adds the special traverse in the very words of the plea, without this, "that it was not finished to the satisfaction of the defendant, *or* to the satisfaction of his surveyor," thereby plainly signifying that it would have been sufficient if the work was approved of by one or the other. We agree that the defendant might have adopted a different course; he might have demurred specially; he might have said to the plaintiff, you leave me in a state of uncertainty, in consequence of your mode of replying; you do not tender an issue sufficiently certain. Instead, however, of saying this, he traversed, and went to trial. Upon this trial, the plaintiff clearly shewed what the intention of the parties was, and he succeeded. It was not his fault that the defendant passed the replication by; and, after verdict, he is, in our opinion, too late. By the 4 & 5 Ann. c. 16, s. 1, no advantage or exception shall be taken of or to an immaterial traverse; and in Com. Dig. Pleader, G. 22,

* If, in an action for work and labour, surveyors be called for the defendant, to prove that, in the year 1831, they surveyed the work, and that, in their judgment, the charges were 100*l.* too much:—Held, that a letter from the defendant's attorney, stating that the work had been surveyed in 1829, and that the charges were considered 60*l.* too much, is not admissible as evidence in reply. (*Knapp* v. *Haskall*, E. T. 1831, N. P., 4 C. & P. 590).

many instances are collected. The defendant was bound to make his stand in the first instance; he should not pass the imputed defect by, and speculate upon the result of the trial.

V. RELATIVE TO DAMAGES.

THORNTON *v.* PLACE, 1832. N. P. 1 *M. & Rob.* 218.

If work differ from that agreed on, the sum recoverable is between the price named and the sum it would take to alter the work.

IN an action for work and labour, it appeared, by the agreement between the parties, that the work was to have been executed according to a specification furnished by the plaintiffs, and at prices therein mentioned. The defendants, however, proved that the work had not been performed according to the terms of the specification.

Per Park, J.—Where a party engages to do certain work on certain specified terms, and in a certain specified manner, but, in fact, does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work so as to make it correspond with the specification.

Wreck.

Salvor of wrecked goods may sell sufficient to defray salvage.

BY 3 & 4 Will. 4, c. 52, s. 49, it is enacted, "That it shall be lawful for the owner or salvor of any property liable to the payment of duty, saved from sea, and in respect of which any sum shall have been awarded, under any law at the time in force, or in respect of which any sum shall have been paid, or agreed to be paid, by the owner thereof, or his agent, to the salvors, to defray the salvage of the same, to sell so much of the property so saved as will be sufficient to defray the salvage so awarded, or such other sum so paid, or agreed to be paid; and that, upon the production of an award made in execution of any such law to the commissioners of his Majesty's customs, or upon proof, to the satisfaction of the said commissioners, that such sum of money has been paid, or has been agreed to be paid, the said commissioners are hereby empowered and required to allow the sale of such property aforesaid, free from the payment of all duties, to the amount of such sum so awarded, paid, or agreed to be paid, or to the amount of such other sum as to the said commissioners shall seem just and reasonable: Provided always, that, if such owner or salvor shall be dissatisfied with any determination of the said commissioners as to the amount of such property to be sold duty free, it shall be lawful for such owner or salvor to refer any such determination of the said commissioners to the judgment and revision of the High Court of Admiralty; and in that case such sale shall be suspended until the decision of such Court shall have been had thereon."

Foreign goods derelict, &c., to be subject to same duties as on importation.

By s. 50, it is enacted, "That all foreign goods derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to: Provided always, that if, for ascertaining the proper amount of duty so payable, any question shall arise as to the origin of any such goods, the same shall be deemed to be of the growth, produce, or manufacture of such country or place as the commissioners of his Majesty's customs shall, upon investigation by them, determine; provided also, that if any such goods be of such sorts as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said commissioners shall from time to time direct; provided also, that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to be charged with duty accordingly."

BARRY *v.* ARNAUD, E. T. 1840. Q. B. 2 *P. & D.* 633.

The word "wreck," in the 3 & 4 Will. 4, c. 52, is not confined to goods which pass to the Crown.

A SPECIAL case stated, that, in March, 1836, the tobacco in question, amounting to 38,569 lb. in weight, having been (together with a certain other quantity of the same, then lost) imported into Great Britain from the place of its growth, and warehoused in certain warehouses at Liverpool, in the county of Lancaster, being then the property of W. and T. Brown & Co., was duly entered for exportation from the port of Liverpool by Joseph Johnstone, consigned to one J. P. Pilgrim, at Antwerp, in the kingdom of Belgium, and then shipped on board a ship called the *London Packet*, bound for Antwerp, with which tobacco the said ship sailed on the said intended voyage; but shortly after leaving Liverpool, viz. on or about the 29th day of the said month of March, the said ship, after she got out of the limits of the said port of Liverpool, met with contrary winds and bad weather, and was thereby forced and compelled to re-enter the limits of the said port, when and where she struck on certain sands in the Irish Sea, within the said limits, and was broken to pieces, and became a total wreck, and all persons on board were drowned; but the tobacco in question, which formed part of the said ship's cargo, was saved, that is to say, some of it was found floating on the sea, and the remainder was thrown on the shore of the English coast by the sea, and was conveyed to the warehouse of Mr. Atherton, the lord of the manor, into which the tobacco was brought or came as aforesaid; and the said tobacco was afterwards conveyed to a certain warehouse at Liverpool, where it was sold on the 12th of April, 1836, by the order of the said Joseph Johnstone, with the consent of the proper officers of his said late Majesty's customs, in that behalf; and the proceeds were applied, first, to the payment of salvage and other usual charges, and then to the benefit and partial relief of the underwriters, who had insured the same at the rate of 60*l.* per cent. In consequence of the damage it had thereby sustained, under the circumstances hereinbefore detailed, it could only be sold for a sum amounting to 3*s.* per pound on its then weight, and was not, in fact, worth more than a total sum of 2892*l.* 13*s.* 6*d.* The defendant was, at the time of the tender

hereinafter mentioned, the collector of his late Majesty's customs for the port of Liverpool, and employed in the said duty of collector by the order and with the concurrence of the commissioners of his said Majesty's customs. His duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry, acknowledging the receipt, and which then became a warrant, authorizing the delivery of such articles from the charge of the proper officers. He had not, according to the proper course, the actual custody of or control over the articles upon which the duty was payable, nor had he, in fact, the actual custody of or control over the tobacco in question, except that the officers who had such actual custody and control might not deliver the articles to the owner without such bill of entry being so signed. On the 6th of August, 1836, the plaintiff tendered to the defendant the sum of 144*l.* 12*s.* 8*d.* as and for the customs' duty due on the said tobacco on its being entered for home consumption, being at and after the rate of 5*l.* for every 100*l.* of the value of the said tobacco.

The Court held, first, that goods cast by storm on the sea-shore, where the owner of them appears, may be claimed by him under the 3 & 4 Will. 4, c. 52, upon payment of the duty upon unenumerated goods, according to the provisions of the 50th section of that statute, though, when so cast on shore, they were not coming or being brought into the kingdom, but were in a course of exportation; and, secondly, that the word "wreck," in the statute, is not confined to goods that would pass to the Crown, or the Crown's officer, by virtue of the prerogative.

BAILIFFS, &c. OF DUNCHURCH *v.* STERRY, H. T. 1831. K. B. 1 *B. & Ad.* 831.

The grantee of the wrecks has such a special property as to maintain trespass until the true owner appears.

IN trespass, it appeared by charter of the 3 Edw. 4, directed to the good men and burgesses of Dunwich, the king granted to the burgesses, their heirs, and successors, that they should for ever have all manner of wrecks of the sea, wheresoever such wrecks within the town liberty precincts, upon the land, sea, and water, should happen to be found; to have and to hold such wrecks and other things that to the officers of the admiral of the king, and of his heirs, did and should belong, to the aforesaid burgesses, their heirs and successors, without anything to the king and his heirs therefor paid. This charter was afterwards confirmed. On the 24th day of January, 1829, one Holmes, being on the sea-beach, perceived the cask of whiskey in question, touching the ground between high and low water-mark, and within the limits to which the above franchise extended; he seized it, with the assistance of two others, carried it above the high water-mark, and then went to Southwold, and came back with a custom-house officer to the spot where the cask was deposited. It was then removed by him and others, in the presence of the custom-house officer, to a place called Waldswick, which was a distance of five miles, and out of the plaintiffs' liberty. While it was there, the defendant, who was aware it had been cast ashore within the plaintiffs' liberty, claimed it on behalf of the corporation of Southwold, took possession of it, conveyed it to Southwold, and placed it in a cellar there. Upon some observations being made about it, the defendant said that he should take it, and claim it, and

then they, the corporation of Dunwich, should prove their rights. The custom-house officer said he should not interfere, but should let it be carried to Dunwich or Southwold, and should follow it to either place, and should then put his locks upon it. Soon after the defendant had taken the cask, the owners, having heard of the circumstance, took it away, paying some dues to the corporation of Southwold. Holmes, who was called as a witness on the part of the plaintiffs, stated, in cross-examination, that he seized the cask partly for the owners and partly for his salvage. Upon these facts, it was contended, on the behalf of the defendant, that the plaintiffs had not proved any possession sufficient to entitle them to maintain trespass. *Parke*, J., was of opinion that they, being grantees of wreck, had a special property in the goods saved, and that was sufficient to entitle them to recover in trespass. The defendant then proved that a ship called "The Queen Charlotte" had been wrecked off the coast in October, 1827; that the captain with the crew escaped from the wreck, and came on shore, and that he and Stead, who was agent for Dunlop & Cooke, owners of the cargo, distributed handbills, requesting all persons to take care of any part of the cargo that might come on shore. One of these handbills was delivered to Holmes, who first found the cask. The defendant also had been requested by Stead, the agent of the owners, to take care of the property, if any of it came on shore. The name of "Dunlop" was on the cask which had been found. *Parke*, J., left it to the jury to say, whether, when the defendant seized the cask, he was acting as agent for the owners of the ship, or as agent for the corporation of Southwold. The jury found that the defendant did not take the cask for the benefit of the owners, but that he did it as agent of the Southwold corporation, and to put the plaintiffs to the proof of their title. Upon this, a verdict was entered for the plaintiffs, with leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that this was not a wreck, or that the plaintiffs had not, by virtue of the charter, such a special property in it as would enable them to maintain trespass, they never having had any actual possession.

The Court held, first, to constitute "wreck," it is not necessary that no person should have escaped alive to land from the vessel; and, secondly, that the grantee of wreck has such a special property in the goods wrecked as to entitle him to maintain trespass against a wrongdoer for taking them away, although the grantee had not seized them.

TALBOT *v.* LEWIS, M. T. 1834. Ex. 1 *C., M. & R.* 495; S. C. 5 *Tyrw.* 1; S. C. 6 *C. & P.* 605.

Statements of tenants of the lord of the manor as to the title of the lord to wrecks, &c. are not admissible.

TRESPASS for breaking and entering the plaintiff's close, and digging up and carrying away Spanish dollars. Pleas, first, negativing the plaintiff's right to the soil; secondly, his property in the dollars. The question to be decided was, whether the plaintiff, as lord of the manor of Landymore, in that county, was entitled by prescription to wreck on Rosilly Sands, alleged to be part of the manor of Landymore. This manor was proved to be within the seignory of Gower, and had come to the plaintiff through an Earl of Pembroke. The plaintiff tendered in evidence a document, dated in 1639, from his muniments, purporting to be answers by certain

persons, some of whom were tenants of the manor, to questions proposed by commissioners appointed by the Earl of Pembroke, lord of the manor of Landymore, wherein they set forth the extent and boundaries of the manor, which answers were read; and in addition to the above, it was proposed to read the following:—"To the ninth article we say, that all wayfes, estrayes, wrecke of sea, and felons' goods, treasure trove, or such like, within the precincts of this manor, doth belonge to the lord of this manor, and how the lord hath heretofore bin answered thereon we know nott." *Parke*, B., allowed the first to prove the boundaries, but refused the other as evidence of the lord's right to wreck. The verdict having passed for the defendant, on motion for a new trial—

Per Cur.—The Crown can only take upon inquest; therefore, where the Crown makes claim, this matter must be tried by a jury. But, in this case, the question was, whether the plaintiff had a right to this wreck as lord of the manor. If, as lord of the manor, he takes it, it must be by grant or prescription, which pre-supposes a grant. The tenants of the manor have nothing to do with this, which is a private right in the lord, and can know nothing more of it than any one of the public. The document was not evidence in this case.

THE END.

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